

03679

1 IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON

2 IN AND FOR KING COUNTY

3
4 STATE OF WASHINGTON,) No. 96-2-15056 SEA
5)
6 Plaintiff,)
7)
8 vs.)
9)
10 AMERICAN TOBACCO CO.; BROWN &)
11 WILLIAMSON TOBACCO CORP.; LIGGETT)
12 & MEYERS, INC.; LORILLARD TOBACCO)
13 CO., INC.; PHILIP MORRIS, INC.;)
14 R.J. REYNOLDS TOBACCO CO.; B.A.T.)
15 INDUSTRIES, P.L.C.; HILL &)
16 KNOWLTON, INC.; THE COUNCIL FOR)
17 TOBACCO RESEARCH-U.S.A., INC.;)
18 TOBACCO INSTITUTE, INC.; foreign)
19 corporations; and unknown corpor-)
20 corporations; and JOHN DOE 1 - 100,)
21 and JANE DOE 1 - 100, individuals,)
22 Defendants.)
23)
24)

14 TRANSCRIPT OF PROCEEDINGS

15 taken before the HONORABLE GEORGE A. FINKLE, Judge,
16 at the King County Courthouse, Seattle, Washington,
17 beginning at 9:05 a.m., Monday, October 26, 1998.
18
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20
21

22 REPORTED BY: Barry Fanning, RPR
23 James D. Lavielle, RPR
24 Official Court Reporter
State of Washington

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03680

1
2 APPEARANCES
3
4 For the Plaintiff: JOHN W. HOUGH, Esq.
5 JON FERGUSON, Esq.
6 Attorneys General,
7 State of Washington
8
9 PAUL N. LUVERA, Esq.
10 Luvera, Barnett, Brindley,
11 Beninger & Cunningham

12
13 STEVE W. BERMAN, Esq.
14 JAMES SOLIMANO, Esq.
15 Hagens & Berman
16
17 WILLIAM J. LEEDOM, Esq.
18 Bennett & Bigelow
19
20 For the Defendant MARY ELIZABETH McGARRY, Esq.
21 BAT Industries: GERALD HAUXHURST, Esq.
22 ANDREW T. FRANKEL, Esq.
23 Simpson, Thacher & Bartlett
24 STEPHEN M. TODD, Esq.
25 Todd & Wakefield

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1
2 APPEARANCES (cont'd)
3
4 For the Defendant BRUCE M. GINSBERG, Esq.
5 Hill & Knowlton: Davis & Gilbert
6
7 THOMAS J. BREWER, Esq.
8 Wickwire, Greene, Crosby,
9 Brewer & Seward
10
11 For the Defendant REED P. SCHIFFERMAN, Esq.
12 Lorillard: Lane, Powell, Spears, Lubersky
13
14 WILLIAM J. CRAMPTON, Esq.
15 Shook, Hardy & Bacon
16
17 For the Defendant ROBERT F. McDERMOTT, Esq.
18 R.J. Reynolds: STEPHEN J. KACZYNSKI, Esq.
19 Jones, Day, Reavis & Pogue
20
21 BRADLEY S. KELLER, Esq.
22 Byrnes & Keller
23
24 For the Defendant JAMES R. MURRAY, Esq.
25 Tobacco Institute: Gordon, Murray & Tilden

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1
2 APPEARANCES (cont'd)
3
4 For the Defendant JOHN W. PHILLIPS, Esq.
5 Philip Morris: Heller, Ehrman, White &
6 McAuliffe
7
8 DAN K. WEBB, Esq.
9 GEORGE C. LOMBARDI, Esq.
10 Winston & Strawn
11
12 STEVE KACZYNSKI, Esq.
13
14 MAURICE A. LEITER, Esq.
15 Arnold & Porter
16
17
18 For the Defendant STEVE McCORMICK, Esq.
19 Brown & Williamson: MICHELLE BROWDY, Esq.
20 Kirkland & Ellis
21

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1 I N D E X

2 Witness Name D C RD RC
3 John Solow 3684

5 E X H I B I T S

7 Exhibit No. Marked Admitted
8 5000 3893
9 5001 3893

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1 Seattle, Washington, 10/26/98, 9:05 a.m.

2 THE COURT: Please sit down.

3 CROSS-EXAMINATION (Cont.)

4 BY MR. WEBB:

5 Q Good morning, how are you?

6 A Fine.

7 Q Let me -- I want to pick up where we left off
8 on Thursday at the end of the day, and we were --
9 actually, if you recall, I had just completed asking
10 you questions about a product called Premier that you
11 had placed on this chart called safer cigarettes, do
12 you recall that?

13 A Yes.

14 Q Let me ask you about another product that you
15 placed on this chart called safer cigarettes that you
16 had written out for the jury, this is called the XA FA
17 and you put dash 1978, see that?

18 A Yes.

19 Q So the jury understands, remember what you
20 said about that, that XA cigarette was it also called
21 the palladium cigarette?

22 A I'm not sure I've seen this called the
23 palladium cigarette, those are the names I saw for it.
24 It certainly involved palladium, that is correct.

25 Q If I called it the palladium XA, you will

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1 know what I'm talking about?

2 A Yes.

3 Q The palladium cigarette was an experimental
4 cigarette product developed by Liggett & Myers in the
5 1970s, is that correct?

6 A Yes.

7 Q This cigarette product involved mixing a
8 substance called palladium right into the tobacco of
9 the cigarette, is that correct?

10 A I think technically it was the salt of
11 palladium, palladium nitrate, or something like that.
12 That is for the scientists. It was a palladium
13 compound, as I understand it.

14 Q The palladium compound was placed right into
15 the tobacco?

16 A I believe it was sprayed onto the tobacco.

17 Q The tobacco that people smoked?

18 A That's my understanding, yes.

19 Q The theory of palladium, is it your position

20 that that palladium XA cigarette, is it your position
21 that that is a safer cigarette that was not properly
22 developed and put into the market?

23 A It was my understanding that the palladium
24 cigarette, the treated cigarette, the XA cigarette,
25 the smoke of that, when condensed and painted on the
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1 backs of mice the way Dr. Wynder used to paint the
2 backs of mice with untreated cigarettes, ordinary
3 cigarettes, did not cause nearly as much -- nearly as
4 many tumors or as much cancer, and that was not
5 brought to market, that's my, I think, understanding
6 in '78.

7 Q I'll ask the question again. Is it your
8 testimony, as you testify to this jury, is it your
9 testimony that the palladium cigarette was a safer
10 cigarette and should have been made available to
11 smokers in the marketplace?

12 A It's my testimony that as I understand it
13 that cigarette was safer, according to that particular
14 test, which was how certainly that the Liggett people
15 thought it was safer, according to that particular
16 test, than was the way people -- that was one of the
17 ways that people tested cigarettes, and it passed that
18 test when others didn't, so they viewed it as a safer
19 product. That's my understanding.

20 Q Are you telling the jury that you believe,
21 based on what you have seen, that it was a safer
22 product that should have been placed into the market
23 for people to smoke based on that animal, mouse
24 testing you just told the jury about?

25 A I'm simply telling you what my understanding
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1 is that this is what Liggett believed. I'm not in a
2 position to judge whether it was safer or not safer.
3 I'm relying on Liggett's own documents, their
4 viewpoint, they thought they had an awfully good
5 product, thought they had a safer product.

6 Q Let's tell the jury. The theory of the
7 palladium cigarette is that the palladium would act in
8 such as way as to reduce the cancer causing properties
9 of the cigarette smoke, is that the theory?

10 A I'm not sure I know what the scientific --
11 how the palladium cigarette worked. From what I read,
12 I'm not sure -- I don't know who knew what about the
13 actual science of it. I know what they did know was,
14 that if you ran the mouse skin painting test, as a
15 general matter you got far fewer consumers and far
16 less cancer. How it worked I'm not sure.

17 What the reaction between palladium and other
18 things in the smoke were, I don't understand that, so
19 I can't tell you what the scientific theory was.
20 There was -- the tests were run, the mice got far
21 fewer tumors. They did the inhalation tests and so
22 forth, and they felt that they -- they felt they could
23 truthfully say that this cigarette did not cause
24 cancer when painted on the backs of mice the way other
25 cigarettes did.

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1 Q Make sure the jury understands what palladium
2 is, am I correct it is a heavy metal substance that is
3 created by extracting it from platinum, or is that
4 correct?

5 A I think I have no idea where palladium comes
6 from.

7 Q When you put it on this chart as a safer
8 cigarette, did you make any effort to find out whether
9 in fact it could be ever considered a safer cigarette?

10 A What I'm saying is that it was my opinion
11 that Liggett felt they had a safer cigarette, Liggett
12 felt they had something that they were prepared to
13 take to market and market as a cigarette that didn't
14 -- let me be precise, Liggett wanted to be very
15 careful that they could substantiate what they said,
16 and what they could substantiate was we believe that
17 this cigarette doesn't cause cancer when used in the
18 mouse skin painting test. Is that what they would
19 have said?

20 Q Did you also see evidence as you reviewed the
21 Liggett materials that Liggett also believed that you
22 could never extrapolate tests on the mice to human
23 beings? Did you see that in the materials you read?

24 A I'm not sure. I'm trying to remember what
25 Liggett felt. I'm trying to answer the question. I
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1 don't know, as I sit here I can't recall what they
2 said about extrapolation.

3 Q Just based on your common experience, I know
4 you're not a scientist, but you live in the world that
5 we live in. Just from a common sense standpoint, had
6 you generally been aware that the scientific world
7 does not accept testing substances on mice to be
8 predictive of the effects that substances will have on
9 humans?

10 A I don't know if -- I think you would have to
11 ask the scientists for an accurate appraisal of that.
12 My sense is that the scientists believed that the
13 information that you get from animal tests of
14 different sorts is indicative of what you might get
15 from humans. That may not be proof, but it's
16 indicative. We're not -- I'll just stop there. The
17 scientists do believe you learn something from animal
18 tests.

19 Q I didn't ask you if they learned something, I
20 asked you whether or not the scientific community
21 believes that you cannot extrapolate data regarding a
22 substance on mice and extrapolate to the human being,
23 because their biological systems are different. Isn't
24 that correct?

25 A That's out of my area of expertise. You will
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1 have to ask the scientists what the scientists believe
2 one can learn, and how much one can learn from animal
3 tests. I know the animal tests are common and
4 presumably, for example, the FDA does animal tests or
5 uses information from animal tests. But this is way
6 outside what I know, and I'm not in a position to say
7 what the scientific community today either does or
8 doesn't believe about animal tests. I know Liggett
9 felt they had something truthful they could say about
10 this product.

11 Q As an economist, you told the jury last week
12 that your bottom line opinion is that the failure of
13 safer cigarettes to be in the marketplace sooner
14 actually harmed this State because -- that's your
15 testimony, right?

16 A That is my understanding, yes.
17 Q That's your testimony to this jury as an
18 economist that the State suffered an economic injury
19 because safer cigarettes were not in the marketplace
20 sooner. Is that correct?
21 A Yes, and the information about the hazards of
22 smoking.

23 Q And so saying that, what year did -- what
24 year should the palladium cigarette have been in the
25 marketplace earlier in order to avoid any economic

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1 harm to the State of Washington?

2 A I think the palladium cigarette would have
3 been in the market in 1978, but that Liggett was
4 pressured by the rest of the industry, by other firms
5 in the industry not to produce this product.

6 Q Let's talk about that. You believe that this
7 product should have been in the market by 1978?

8 A I think it could have been in the market by
9 1978 or 1979, but that around that time Liggett was
10 threatened and told not to produce this product.

11 Q We'll talk about that. This substance called
12 palladium, it does not naturally occur in tobacco. Is
13 that correct? It was put in there by Liggett?

14 A That's my understanding. There may also be
15 some amount of palladium in tobacco. I don't know the
16 science of that. They certainly were adding palladium
17 nitrate to cigarettes. That's how the process worked,
18 as I understand it.

19 Q Did you learn in reaching your opinion about
20 whether this is a safer cigarette, did you learn that
21 it is toxic to humans if ingested in certain
22 quantities? Did you see any evidence of that?

23 A No, not particularly. I don't doubt it.
24 Lots of things are toxic for people if ingested in
25 large enough quantities.

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1 Q Did you look into that issue?

2 A No, what I looked into was what Liggett felt
3 about that issue. I think I said last week it
4 appeared to me that Liggett took that issue quite
5 seriously. Liggett did tests to see if -- Liggett was
6 concerned that maybe the palladium itself would be
7 harmful. They did inhalation studies, they had the
8 mice breathe the smoke from the cigarettes for years,
9 two years, they could find no trace of palladium in
10 the mice.

11 They did some other investigation of the
12 injuries of the health of palladium workers, and
13 Liggett was seriously concerned about that issue, and
14 nonetheless felt that there was no -- there was not a
15 risk there.

16 Q When you say Liggett, so I understand, you
17 did read the Congressional testimony under oath of the
18 president of Liggett when he told Congress --

19 MR. FERGUSON: Objection, hearsay.

20 THE COURT: Sustained.

21 BY MR. WEBB:

22 Q You have relied upon hearsay information that
23 you picked up from reading what is in documents, is
24 that correct, that you are relying upon in testifying
25 to this jury?

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1 A I don't know. I've tried not to testify
2 about things I've been told not to mention to the
3 jury.
4 Q Did you --
5 A This hearsay business is a legal issue which
6 I don't fully grasp.
7 Q Did you read the Congressional testimony
8 given by the president of the Liggett on the issue as
9 to whether or not he believed this was a safer
10 cigarette? Did you read his testimony? That's my
11 question.
12 A I may have, yes, I think I did.
13 Q And did you take what he told Congress into
14 consideration when you tell this jury that Liggett
15 believed it was a safer cigarette?
16 A I think to some extent I do, yes.
17 Q Did you -- do you recall when you read over
18 his testimony, that the president of Liggett told
19 Congress that he did not believe this was a safer
20 cigarette?
21 A I may have seen that.
22 Q Did you disregard his testimony?
23 A No, I weighed it in the balance with
24 everything else I read, including the testimony of
25 people who suggested that they thought that perhaps he

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1 was being less than truthful.
2 Q As an expert to this jury, you have actually
3 weighed credibility of what one person said versus
4 what another person said about the cigarette, then you
5 made a value judgment as to their credibility?
6 A No.
7 Q I thought you just told me that you weighed
8 what the president said to Congress with what other
9 people in Liggett said about the cigarette and
10 concluded it was a safer product?
11 A I have to look at all the documents that are
12 available, and seems to me that the documents indicate
13 that they were prepared to go ahead with this product.
14 In fact, the president of Liggett seemed to be very
15 much in favor of going ahead with this product. In
16 fact, when the issue of the FTC came up with this
17 product, and the concern was that maybe the FTC
18 wouldn't let them make health claims, the president of
19 the company said, let's go ahead and make the claims,
20 I don't think the FTC can stop us if we're telling the
21 truth. He seemed in the documents to be very much in
22 favor of going ahead with this product. He was
23 pushing very hard for this product.
24 Q Did you ignore his Congressional testimony?
25 A No, I didn't. It seems that his

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1 Congressional testimony is somewhat inconsistent with
2 what he said on paper inside the company.
3 Q You made a credibility judgment with his
4 Congressional testimony?
5 A I didn't. I think that Mr. Meyer did -- made
6 a statement about the credibility of his testimony. I
7 look at all of it put together as best I can, and
8 including the deposition of Larry Meyer, and so forth.
9 I think the jury will get to hear from those
10 people themselves, but when you look at the whole
11 picture, when you put the whole thing together, it

12 seemed to indicate that they felt that they had a
13 product, a safer product, that they took the health
14 risk seriously, they took the telling the truth issue
15 seriously, and that the reason why they chose not to
16 produce the product is they were threatened with
17 annihilation.

18 Q Isn't the reason Liggett decided not to
19 produce the product because Liggett came to the
20 conclusion that it was not a safer product because the
21 palladium might actually cause harm to smokers? Isn't
22 that what happened?

23 A That's not my understanding of what happened,
24 no.

25 Q In preparing for your testimony, did you at
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1 least review evidence that the public health community
2 had expressed concern that if you put palladium into
3 tobacco that the palladium may seep into the smoke and
4 be toxic to humans? Did you see evidence of that?

5 A I'm not sure I saw that from the public
6 health community. I know Liggett was quite concerned
7 about that and wanted to take that issue seriously,
8 and took that issue seriously, and they were -- as a
9 result of their tests felt that the level of palladium
10 being used was sufficiently low that it was not
11 showing up in the animals.

12 Q Let's talk about that. Were you here when
13 Dr. Burns, the first witness in this case, explained
14 to this jury that when a cigarette company tries to
15 develop a cigarette product that will address health
16 concerns, and when it starts to change the composition
17 of the smoke by adding something or taking something
18 out, that the first thing the cigarette company had
19 better be sure of is that it's not actually creating a
20 more dangerous product by tampering with the product.
21 Did you hear that testimony?

22 A I've been here a long time, but no, I haven't
23 heard Dr. Burns' testimony. I wasn't here when Dr.
24 Burns testified.

25 Q I thought you were here.

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1 A No, that would have been a month or three
2 weeks of my time. I haven't got that much time. I
3 wasn't here when Dr. Burns testified.

4 Q Does it make common sense to you as
5 an economist that if a cigarette company is trying to
6 develop a safer product, and it starts to add things
7 into the tobacco, that it needs to be careful not to
8 create a more dangerous product. Would you agree with
9 that?

10 A Makes sense to me, yes.

11 Q In connection with this product, specifically
12 the palladium cigarette, in preparing for your
13 testimony were you shown documents by the State that
14 indicated to you that the palladium cigarette may
15 actually be a more dangerous product because the
16 palladium cigarette actually increased the presence of
17 carcinogen called nitrosamines?

18 A My understanding of that from the documents
19 that I was provided was that the -- again, that
20 Liggett was concerned about the fact because they were
21 adding palladium nitrate to the cigarette that would
22 raise the level, again, the science of it I'm not

23 positive, but either nitrosamines or nitrous oxide,
24 something along those lines, and they responded by
25 using a filter to bring those down to the same --

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1 they added one compound, it was beneficial one way but
2 raised something else, so they added a filter to
3 offset that. That was my understanding, again, it was
4 they were concerned about doing this properly and
5 recognizing all the things that they were doing.

6 Q I'll show you a document that's in evidence,
7 Defendants' Exhibit DA241, and ask you to examine it
8 and I'll put it on the screen.

9 Did you have an opportunity to review this
10 document before you testified, sir?

11 A No.

12 Q Look at it together.

13 You will see, if I focus in on it, you can
14 see this is a document, it's a Philip Morris document
15 prepared by F. A. Reznick sent to Mr. Clifford
16 Goldsmith, see that?

17 A Yes.

18 Q Do you know who those people are?

19 A I think I know who Mr. Goldsmith is, I'm not
20 quite sure I know who Mr. Reznick is.

21 Q Who is Mr. Goldsmith?

22 A I think he is a high level executive of
23 Philip Morris.

24 Q This is dated November 1978, see that?

25 A Yes.

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1 Q Read what this says, it says the LM -- that
2 means Liggett & Myers, is that correct?

3 A Yes.

4 Q -- patent on the addition of palladium to
5 tobacco, see that?

6 A Yes.

7 Q Now, just so the jury understands the
8 reference to the Liggett & Myers patent, Liggett &
9 Myers actually went out and filed a patent on the
10 palladium XA cigarette, is that correct?

11 A That's correct.

12 Q That meant other people could get access to
13 the patent and analyze what people were trying to do
14 with the palladium cigarette, is that correct?

15 A Other people at that point were alerted to
16 what Liggett -- what research they had and what they
17 had produced and patented, that is correct.

18 Q This document describes the Liggett & Myers
19 patent on the addition of palladium to tobacco
20 incorporated in cigarette is of no practical value for
21 the following reasons: Number one, palladium alone is
22 not effective. The cigarette smoke condensate
23 produced by the addition of palladium alone to the
24 tobacco was not different from a control cigarette on
25 mouse skin painting tests. See that?

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1 A Yes.

2 Q And did you also see evidence that what is
3 set forth there is true, that when Liggett tested
4 palladium alone it did not have any effect of reduce
5 -- strike the question.

6 It did not have any beneficial effect in
7 reducing the cancer tumors any more than compared to

8 conventional cigarettes?
9 A I'm not sure I saw that. They may have found
10 that, I'm not sure I saw that.
11 Q See what else this document says.
12 Palladium plus sodium nitrate is no more
13 effective than sodium nitrate alone. See that?
14 A Yes.
15 Q Did you become aware that what Liggett did
16 was actually add to the cigarette a substance called
17 palladium along with another chemical called sodium
18 nitrate, is that correct?
19 A That's not my understanding, but again, they
20 were dancing on the very edge of what I understand
21 about science. My recollection is it was palladium
22 nitrate plus sodium nitrate -- yes, I think it was
23 palladium nitrate, not straight palladium, but again
24 I'm not a chemist, it's been a long time since
25 chemistry.

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1 Q You generally became aware whether it was
2 palladium or palladium nitrate was combined with
3 sodium nitrate, is that correct?
4 A I believe so, I think that's my recollection,
5 yes.
6 Q It says the cigarette containing palladium
7 plus a three percent sodium nitrate showed an 89
8 percent reduction in tumor incidents on mouse skin
9 painting tests, however the addition of only sodium
10 nitrate by other experimenters have shown similar
11 results, and they cite Hoffmann and Wynder with an 8.3
12 percent sodium nitrate and 84 percent reduction in
13 tumor incidents, and cite another study by Stanton
14 Wells 7.7 percent sodium nitrate, 66 percent reduction
15 in tumor incidents. See that?
16 A Yes.
17 Q Is that consistent with what the evidence
18 establishes when you look at the Liggett document?
19 A This is the first time I've seen that.
20 Q See what it says here, the addition of sodium
21 nitrate adds oxides of nitrogen to smoke, see that?
22 A Yes.
23 Q The addition of these quantities of sodium
24 nitrate to cigarette tobacco produces large amounts of
25 oxides of nitrogen in the smoke which is completely

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1 objectionable from the standpoint of animal inhalation
2 experiments, see that?
3 A Yes.
4 Q Did you learn that what that is referring to
5 is the fact that when you add that quantity of sodium
6 nitrate to cigarette tobacco it produces these large
7 amounts of oxides of nitrogen which then lead to the
8 production of nitrosamines, which are a carcinogen in
9 cigarette smoke?
10 A No. My understanding is, as I said, was that
11 Liggett -- this is Philip Morris' view on the matter,
12 but Liggett recognized that adding sodium nitrate
13 increased the nitrous oxides, and as a result used I
14 believe it was a cellulose acetate filter to bring
15 those down to the same level that they would be in any
16 other cigarette, so that they offset the impact of
17 having higher -- of having sodium nitrate through a
18 filter so it wouldn't be any less safe on the

19 dimension of nitrous oxides, but it was still safer or
20 performed better on the dimension of causing cancer in
21 the skin painting test.

22 Q One step at a time. I take it you have now
23 learned based on reviewing Liggett documents that
24 Liggett became aware that it was increasing the oxides
25 of nitrogen in the smoke?

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1 A I think in the early stages of the design
2 they became aware of that and figured out a way to
3 offset that problem, so that the finished product, as
4 I understand it, the finished product had the same
5 level of nitrous oxides as other cigarettes once you
6 used this filter, but they do learn in the middle of
7 their development that this is something they had to
8 deal with, so they found to way to deal with it.

9 Q You do recognize when you increase the oxides
10 of nitrogen that you will likely increase
11 nitrosamines, did you learn that?

12 A No, that link -- this is why when you said it
13 caused more nitrosamines, my recollection was that it
14 was nitrous oxide -- I don't know the link between
15 nitrous oxide and nitrosamines. I knew that they were
16 concerned about nitrous oxide and they had a filter
17 -- that when they used the filter they reduced the
18 levels of nitrous oxides to the same level of other
19 cigarettes, and the rest of the science of it, I can't
20 tell you.

21 Q Assume the evidence will establish that when
22 you increase oxides of nitrogen, that you thereby
23 increase nitrosamines. I'll ask you to assume that.

24 A Okay.

25 Q Do you think that should cause Liggett some

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1 concern in producing a cigarette that increases
2 nitrosamines in the final product?

3 A If, if the evidence was that in the final
4 product the level of nitrous oxide, nitrogen oxides
5 were higher and therefore the level of nitrosamines
6 would be higher, by assumption then I presume it would
7 be something to be concerned about.

8 Q Do you agree that ultimately, Dr. Solow, that
9 you're ultimately not the person to tell this jury
10 definitively once and for all whether this product in
11 fact is safer or not safer than conventional
12 cigarettes?

13 A That's right, I'm relying on the documents
14 that I've seen where Liggett felt that it had a
15 product that was worth marketing, that it had claims
16 that it could honestly make, it thought it could take
17 them to the Federal Trade Commission in advance and
18 demonstrate that they could substantiate those claims
19 and therefore not run afoul of the FTC. And Philip
20 Morris may have felt differently, but in a competitive
21 market it would have been Liggett's decision on its
22 own to go ahead or not go ahead with that project, not
23 have Philip Morris or Brown & Williamson or someone
24 else tell them that if they did that they would be
25 annihilated.

03705

1 Q My question is, are you the right person to
2 tell this jury whether this in fact would have been a
3 safer cigarette?

4 A No, I think the doctors are in a better
5 position to say whether these things are a safer
6 cigarette. I'm saying I thought Liggett -- my opinion
7 is Liggett felt they had a safer cigarette.

8 Q Do you think Liggett people would be in a
9 better position than you're in to tell this jury what
10 they actually believed?

11 A Yes, probably.

12 Q Thank you.

13 Now let me go to another issue that in
14 connection with this first agreement you put on the
15 chart here, the arrangement not to advertise on the
16 basis of health, number one, see that?

17 A Yes.

18 Q I want to make sure you know what agreement
19 I'm talking about.

20 A Yes.

21 Q This is your first agreement here?

22 A I see it.

23 Q In connection with that agreement, you
24 testified last week to the jury that you believed that
25 an advertising dispute between Philip Morris and the

03706

1 British American Tobacco Company that took place in
2 Holland in 1983 was evidence of that collusive
3 agreement, is that correct?

4 A Yes.

5 Q And now the British American Tobacco Company
6 -- that's a company that is headquartered in England,
7 is that correct?

8 A Yes.

9 Q And their business is almost exclusively in
10 countries other than the United States, is that
11 correct?

12 A Yes. I guess so.

13 Q You told -- well, when you identified the
14 people who were present at the Plaza Hotel meeting
15 where this agreement was begun, as you said, the
16 origins of the agreement, was there any representative
17 for the British American Tobacco Company at that
18 meeting?

19 A No, I don't believe so.

20 Q So the jury understands, the incident which
21 we'll talk about here involved a cigarette called the
22 Barclay cigarette, is that correct?

23 A Yes.

24 Q Let's tell the jury a little more about what
25 the Barclay cigarette was based on your preparation to

03707

1 testify here in this proceeding.

2 Barclay was a cigarette that was actually
3 developed and put into the marketplace by Brown &
4 Williamson, is that correct?

5 A I believe so.

6 Q That took place in January 1981, is that
7 correct?

8 A I couldn't tell you the date it was
9 introduced.

10 Q Did you look at the history of the Barclay
11 cigarette?

12 A Some of it, yes. I have some understanding
13 of the history of the Barclay cigarette.

14 Q In looking at the history of the Barclay

15 cigarette do you recall that in the early 1980s here
16 in the United States that Brown & Williamson began to
17 advertise Barclay as an ultra low tar cigarette with
18 only one milligram of tar, 99 percent tar free. Did
19 you at least see some evidence of that?

20 A Yes, I think that's my recollection.

21 Q As a result of Barclay advertising -- strike
22 that.

23 As a result of B&W advertising that Barclay
24 cigarette as ultra low tar, 99 percent tar free, one
25 milligram of tar, Barclay actually in the first three
03708

1 or four months of its sale, substantially grabbed a
2 good share of the market, about 1.3 percent, is that
3 correct?

4 A I think that's more or less correct.

5 Q And those advertisements that were being
6 promoted by Brown & Williamson, it's your contention
7 that Brown & Williamson was part of this collusive
8 arrangement not to advertise on the basis of health?

9 A Yes.

10 Q When Brown & Williamson in the early 1980s
11 was out there advertising this Barclay cigarette as an
12 ultra low tar, one milligram cigarette, 99 percent tar
13 free, would you agree that they were advertising
14 making a health claim in that ad, in those ads?

15 A As I said before, I think it's fair to
16 conclude that some consumers might infer that was
17 better for them.

18 Q So if Brown & Williamson were part of this
19 collusive agreement they should not be running those
20 kind of advertisements, should they?

21 A I think they are pushing the limits -- by the
22 way, by this time, by 1981, as I recall, the FTC was --
23 the FTC had approved only the listing of tar and
24 nicotine content by FTC numbers, so I think to that
25 extent they were running the ads that they thought

03709

1 they could.

2 Q Well, but those kind -- they did more than
3 run the little box with the tar and nicotine levels,
4 didn't they? They ran these headline ads, low tar, 99
5 percent tar free, one milligram tar, you have seen
6 those ads?

7 A Yes, I've seen those ads.

8 Q Those are health claims, aren't they?

9 A As I say, I think those are weak health
10 claims.

11 Q If there was a collusive agreement, they
12 shouldn't be running those kinds of ads?

13 A I'm not suggesting the collusive agreement
14 was perfect and they were not able to run any ads at
15 all that make any health claims whatsoever, I think
16 that would have been the desired goal of the industry.
17 As I said, as Dr. Calfee pointed out when the industry
18 -- when the FTC requested the companies to run their
19 tar and nicotine content, the industry and the
20 cigarette advertising code administrator resisted
21 that, but that is what they were told they should do.
22 So at that level only they were making -- they were
23 running ads that had those weak claims in them, which
24 may or may not have been truthful claims, but had
25 those weak claims in them.

03710

1 Q Are you now telling us that the agreement
2 that you put as number one was actually not, -- I
3 thought you told us last week this was an agreement
4 not to advertise on the basis of any health claims?

5 A That was the aim, I think, yes. These
6 agreements, I've never suggested that these agreements
7 were entirely 100 percent successful, but that was the
8 aim. Certainly it changed the nature of advertising
9 in the 1950s, in my opinion, and as we'll see there
10 are instances in which companies had truthful health
11 claims that they thought they could make and chose not
12 to make them.

13 Q What happened here was -- tell me if I'm
14 correct, if you know this from preparing to testify
15 -- my clients Philip Morris and R. J. Reynolds,
16 another tobacco company, believed and questioned the
17 accuracy of those Barclay ads, is that correct?

18 A Yes, I believe that is true.

19 Q In fact, R. J. Reynolds and Philip Morris
20 both went to the Federal Trade Commission and
21 complained to the Federal Trade Commission that those
22 ads were unfair and misleading, didn't they?

23 A I think that's true. I think, as Dr.
24 Henningfield testified, is that what Brown &
25 Williamson actually had done was find a way to cheat

03711

1 the FTC's smoking machine very effectively, and Philip
2 Morris and Reynolds did in fact go to the FTC and say
3 they're cheating your machine, which is what Dr.
4 Henningfield testified that was the game in the 1980s,
5 to figure out ways to cheat the machine and Brown &
6 Williamson found a way to do it very well.

7 Q Call it cheating, no need to argue with you
8 over that issue, but you were aware that Philip Morris
9 went to the Federal Trade Commission and basically
10 complained that this Barclay cigarette is the only
11 cigarette that is not being measured in a fair way, is
12 that correct?

13 A Yes, I don't have any reason to doubt that.
14 I think it would be unlikely for a company to say they
15 are cheating the machine better than we're cheating
16 the machine, therefore you should stop them but not
17 stop us. No one is going to say that, but it wouldn't
18 surprise me to say yes, they are cheating the machine,
19 we're not.

20 Q When Philip Morris got angry at Brown &
21 Williamson and went to the Federal Trade Commission
22 and said this Barclay cigarette is being advertised
23 improperly, that is what you would expect competitors
24 to do, is it not?

25 A Yes, if you feel another firm is running

03712

1 deceptive advertising, I wouldn't find it
2 anti-competitive for a firm to then complain to the
3 FTC if they felt that was deceptive.

4 Q If Brown & Williamson felt the ads were not
5 deceptive and insisted on the right to continue to run
6 them, they have the right to do that, don't they,
7 until the Federal Trade Commission tells them to stop?

8 A As I understand it, that is correct, yes.

9 Q That's what you told the jury you want the
10 tobacco companies to do is basically challenge the

11 FTC, right up to the wall?

12 A If they can substantiate their claims, then I
13 think that they are likely to win. Hopefully they
14 will win, hopefully the FTC is doing the job right, if
15 they can substantiate the claims, truthful claims can
16 be substantiated, they should go ahead and do it. I
17 think the FTC said that, and other companies
18 understood that, yes.

19 Q Brown & Williamson was acting completely
20 inconsistent with any kind of agreement of collusion
21 on health claims because it was making, you called it
22 weak health claims in ads, and it refused to stop
23 running them, didn't it?

24 A At least it was running advertisements that
25 listed the tar and nicotine levels, and measured by

03713

1 the FTC machine I don't think -- I don't know that
2 there was anything untruthful about that claim as
3 such. That's what the FTC machine did say, and Philip
4 Morris and Reynolds were upset because they figured
5 out that Brown & Williamson -- that Barclay had
6 managed to cheat the machine very well, they managed
7 to get very low readings, but they didn't think that
8 was an accurate measurement of tar and nicotine given
9 the way people actually smoked the cigarette. That's
10 my understanding.

11 Q Actually what happened, isn't it, that we
12 don't need to spend a lot of time on the history of
13 the FTC, after Philip Morris and R. J. Reynolds
14 complained you have seen the evidence that Federal
15 Trade Commission took action against Brown &
16 Williamson to try to stop the ads, is that correct?

17 A I believe, yes.

18 Q The case wound its way through the court
19 system and eventually in 1984 the courts made the
20 final decision that BW could no longer advertise the
21 cigarette as a one milligram cigarette but could
22 continue to say that they are 99 percent tar free, is
23 that correct?

24 A As I sit here, I can't remember what the
25 final ruling was, but I'm willing to take your word

03714

1 for that.

2 Q That type of dispute between two competitors
3 over the other fellow's advertising, there is nothing
4 anti-competitive about that at all, is there?

5 A That all by itself going through the FTC that
6 way, no, that's not.

7 Q You came to learn that this dispute -- by the
8 way, when there is a competitive market out there and
9 people are competing for sales, there are frequently
10 times if you are having aggressive competition that
11 these competitors have disputes with each other, don't
12 they?

13 A There are a variety of the dimensions firms
14 could have disputes, is that correct.

15 Q As an economist aren't you trying to look to
16 see if there are disputes is that an indicia,
17 indication of competition?

18 A Not necessarily, depends on -- there are many
19 -- there are several dimensions we talked about along
20 which firms can compete and there are many dimensions
21 along which firms can have disputes and you have firms

22 -- I'll give you an example. In Latin America where
23 the evidence is quite clear to me that Philip Morris
24 and British American Tobacco were price fixing and had
25 agreements to share the market, nonetheless, they had

03715

1 a dispute about the packaging of their brands.

2 One of the two, I can't remember which one
3 was infringing on whom but one of the two was using a
4 box that looked too much like the other box and two of
5 them had a dispute about that and were upset.

6 Yes, they had a dispute about packaging and
7 settling internally but at the same time it's clear
8 the market wasn't competitive, they were fixing prices
9 in that market. So the mere fact that firms have
10 disputes is not necessarily indicative of competition
11 or the lack of competition.

12 Q But this dispute between Philip Morris and BW
13 was on the very issue that you say there was
14 a collusive agreement on?

15 A Yes, I think the rest of the evidence about
16 that dispute, the part that didn't take place within
17 the FTC proceedings but took place in letters and
18 phone calls and meetings between Brown & Williamson --
19 sorry, between British American Tobacco and Philip
20 Morris suggests that that is consistent with the there
21 being an agreement.

22 Q We'll talk about that now, talk about that so
23 the jury understands what happened. This dispute
24 between Philip Morris and Brown & Williamson was not
25 limited to the United States because Brown &

03716

1 Williamson's sister companies overseas were also
2 advertising this Barclay product, this cigarette as
3 being this one milligram tar, very low tar 99 percent
4 tar free cigarette, is that correct?

5 A That's correct.

6 Q You saw that this dispute between Brown &
7 Williamson and Philip Morris actually led to
8 litigation in a number of different foreign countries,
9 is that correct?

10 A The only one I know of is Holland, I don't
11 know of any other countries.

12 Q Did you review any documents that indicated
13 that Philip Morris and Brown & Williamson actually
14 ended up -- strike that.

15 Did you see documents that indicated to you
16 that Philip Morris and Brown & Williamson or Brown &
17 Williamson's sister companies ended up in litigation
18 in Belgium, Holland, Germany, Switzerland and Norway?

19 A No, the only one I say anything about that I
20 can recall was Holland.

21 Q Talk about Holland then.

22 A Okay.

23 Q The episode in Holland was a dispute over
24 this same Barclay cigarette, is that correct?

25 A Goes a little beyond that, it's also a

03717

1 dispute about Philip Morris' advertising with regard
2 to that. It went well beyond just the Barclay
3 cigarette there was a dispute about Philip Morris'
4 advertising and the Barclay cigarette.

5 Q The dispute involved the Barclay cigarette
6 start with that, is that correct?

7 A Yes.
8 Q What it involved was an advertisement that
9 Philip Morris ran in a Holland newspaper in September
10 of 1983, is that correct?
11 A That's right.
12 Q What so the jury understands, Philip Morris
13 ran an advertisement in a Holland newspaper, is that
14 correct?
15 A I would in say in a Dutch newspaper.
16 Q Call it a Dutch newspaper?
17 A Yes.
18 Q That Philip Morris paid for that
19 advertisement, is that correct, to your understanding?
20 A I would assume they paid for it.
21 Q What Philip Morris did was that it reprinted
22 an attack on the Barclay cigarette that had been made
23 by an anti-smoking group that had ran in the newspaper
24 the day before in Dutch?
25 A In Dutch and in a Dutch newspaper.

03718

1 Q Is that correct?
2 A In the Dutch language and in a Dutch
3 newspaper, yes, I believe that's correct.
4 Q Now the British American Tobacco Company is a
5 sister company to Brown & Williamson, is that correct?
6 A Yes.
7 Q And the British American Tobacco Company
8 immediately took legal action against Philip Morris on
9 the grounds that Philip Morris' advertisement in those
10 Dutch newspapers actually violated a Dutch law, is
11 that correct?
12 A I understand they filed such a claim, yes.
13 Q And they claimed that under this Dutch law
14 that Philip Morris did not have the right to run that
15 type of comparison ad, is that correct?
16 A I don't know all details what they claim, but
17 they claimed that what Philip Morris had done was a
18 violation of Dutch law?
19 Q And Philip Morris agreed not to publish the
20 advertisement again but refused to run a retraction,
21 is that what happened?
22 A Yes.
23 Q Now, by the way, if it turned out that Philip
24 Morris' ad in Holland and the Dutch newspaper turned
25 out to in fact be a violation of the unique laws of

03719

1 Holland, it would be okay for Philip Morris to stop
2 running the ads, wouldn't it?
3 A Yes, I suppose -- no, you wonder why they
4 would have run in the first place if it was in
5 violation of Dutch law.
6 Q Do economists make mistakes?
7 A Sure.
8 Q Do you think tobacco companies might make
9 mistakes sometimes?
10 A Sure.
11 Q It would not be an anti-competitive act if
12 Philip Morris decided not to rerun the ad again
13 because it became concerned about the parameters of
14 Dutch law, would it?
15 A No, if that's all that had happened, no, it
16 wouldn't.
17 Q And the document that you -- I'll show you

18 one of the documents that you showed the jury about
19 this episode.
20 This document is in evidence as State's
21 Exhibit 2590, you were shown by Mr. Ferguson, I'll show
22 it to you so you know what we're talking about.

23 A Yes.

24 Q This is a document on the letterhead of the
25 British American Tobacco Company, see that?

03720

1 A Yes.

2 Q Dated September 20, 1983, see that?

3 A Yes.

4 Q And you testified about this document during
5 your direct examination by Mr. Ferguson.

6 Do you recall that?

7 A Yes.

8 Q This actually talks about -- the heading on
9 the document is relations with Infotab, National
10 Manufacturers Association NMAS, see that?

11 A Yes.

12 Q So the jury understands the heading on the
13 memo, this British American Tobacco Company document
14 is -- it's actually an internal memo, up here it's a
15 letter to I think that's all number ones of
16 the operating companies, is that correct?

17 A That's my understanding.

18 Q That means the British America Tobacco
19 Company is communicating with some level of management
20 inside of its company?

21 A Yes, number ones of the subsidiaries of
22 British American Tobacco, that is right.

23 Q What this document reflects, if we actually
24 read it -- by the way, says Infotab was an
25 international trade association for tobacco companies,

03721

1 is that correct?

2 A Something like that was my understanding,
3 yes.

4 Q And you told the jury there is nothing wrong
5 or improper about companies being members of trade
6 associations, is there?

7 A Not in and of itself, depends on what goes on
8 in the trade association.

9 Q Almost every industry has a trade
10 association, is that correct?

11 A Yes.

12 Q Now what this document says is that -- it
13 recounts the dispute between Philip Morris and the
14 British American Tobacco Company over this ad, is that
15 correct?

16 A Yes.

17 Q And --

18 A At least somewhat.

19 Q Go through -- we don't want to mistake --
20 says October 2 in Holland the Philip Morris company,
21 and in that country, published an advertisement,
22 appendix A attached?

23 MR. FERGUSON: You said October 2.

24 MR. WEBB: I'll reread, apologize, instead of
25 September 2, apologize.

03722

1 Q Says on the second of September, see that?

2 A Yes.

3 Q In Holland the Philip Morris company in that
4 country published an advertisement, dash, appendix A
5 attached, see that?
6 A Yes.
7 Q I think you showed the jury or talked about
8 appendix A when Mr. Ferguson was asking you questions,
9 is that correct?
10 A I can't recall whether we showed them
11 appendix A or not.
12 Q You recall seeing the document?
13 Appendix A shows the ad, is that correct?
14 A It's my understanding.
15 Q The advertisement had two inch headlines
16 saying a message about which smokers must not think
17 too lightly, there followed an extraction from an
18 article the previous day in the same newspaper, a
19 translation of this article is attached as appendix B.
20 Did you see appendix B when you read the
21 document?
22 A Yes. A is in Dutch, I don't speak Dutch.
23 Q B was in English?
24 A B is in English, that's right.
25 Q This advertisement is the first occasion of

03723

1 which we are aware when a competitor has raised the
2 health issue to gain competitive advantage, see that?
3 A Yes.
4 Q And quoted and thereby endorsed a report of
5 an anti-smoking lobby, in this instance the Dutch
6 Association of Public Health and Smoking to attack
7 another company in the industry, see that?
8 A Yes.
9 Q The memo goes on to say our lawyers in
10 Holland immediately advised the Philip Morris company
11 that they were breaking the Dutch law in three ways,
12 namely, using comparative advertising, using
13 misleading advertising, and infringing the trade
14 descriptions act by mentioning Barclay, i.e., a brand
15 that was not theirs, see that?
16 A Yes.
17 Q Did you make any effort to find out whether
18 or not Philip Morris in fact violated a law in Holland
19 called the trade descriptions act?
20 A No.
21 Q It says, the lawyer further asked Philip
22 Morris to reply in writing by 12:00 p.m., fifth of
23 September to the effect that they would immediately
24 stop this advertising or any variance of it in any
25 medium.

03724

1 Number two, they will insert a retraction in
2 all the media in which the original advertisement was
3 placed such a retraction to be published by 12:00 p.m.,
4 fifth of September, 1983, see that?
5 A Yes.
6 Q Our lawyers further advise Philip Morris that
7 in default of such by them we would take immediate
8 steps by legal means to obtain a full retraction of
9 the statement and an injunction preventing such
10 statements in the future.
11 The Philip Morris company in Holland agreed
12 not to publish the advertisement again but they did
13 not agree to publish a retraction.

14 As a result on nine September legal
15 proceedings were instituted by our company in Holland
16 for a hearing on 15 September. A decision is expected
17 from the court not later than the 29 September, see
18 that?

19 A Yes.

20 Q Now there is -- so far there is nothing about
21 the fact that Philip Morris and B&W are now in this
22 argument over the legality of ad that would be
23 anti-competitive, is that fair to say?

24 A No, I disagree with that, go back to the
25 first page.

03725

1 Q Tell me what is anti-competitive.

2 A Go back to the first page, I'll read you the
3 language.

4 Q Where?

5 A Right there, that's perfect. This
6 advertisement is the first occasion of which we are
7 aware when a competitor has raised the health issue to
8 gain competitive advantage.

9 To me that is indicative of the main
10 complaint here is here we have an advertisement that
11 uses the health issue to gain a competitive advantage
12 and this is the first time in 1983 that we're aware
13 that anyone, a competitor has ever done that.

14 Q You know that's not true?

15 A I know that's not true, that's an
16 overstatement. But it's certainly true that the
17 number one thing in the document is the concern that a
18 competitor is using the health issue to gain
19 competitive advantage and if you go back and look at
20 the telex which was attached to this, the claim there
21 from the CEO or the chairman of the board of BAT
22 Industries, the parent company of BATCo and Brown &
23 Williamson, is that the main concern is how can you
24 make a mockery of industry cooperation on this issue
25 and things like that.

03726

1 They did in fact say, they did in fact say
2 they felt this was illegal and they instituted
3 proceedings but the number one issue raised in
4 everything that you read is that this is the first
5 occasion of which we're aware when a competitor has
6 raised a health issue to gain competitive advantage in
7 a competitive market. I would expect to see
8 competitors raising the issues truthfully to gain
9 competitive advantage all the time, that's what
10 competition is about, gaining competitive advantage.

11 Q And the fact is you have seen the ads where
12 these tobacco companies were raising health issues,
13 the ads I showed you last week?

14 A Yes, I've certainly seen those ads. I think
15 if you look at those ads in comparison with the ads
16 that were running before that time you would see they
17 backed off trying to gain competitive advantage on the
18 basis of health and if you look at the trade press of
19 the time you will see a big change in -- big change
20 toward doing a lot of less of using the health issue
21 to gain competitive advantage.

22 The movement as a result of this meeting was
23 clearly in the opposite direction.

24 Q You told us now that this language -- I want

25 to go to the telex.

03727

1 A Okay.

2 Q It says here -- I'm reading the paragraph --
3 says on nine September, see that?

4 A Yes.

5 Q The chairman of BAT Industries sent a telex
6 to Mr. George Weissman, Chief Executive of Philip
7 Morris in New York, strongly protesting about the
8 events in Holland. He further pointed out that Philip
9 Morris, Philip Morris' action made a mockery of
10 industry cooperation on smoking and health issues and
11 asked for a retraction of the advertisement and a
12 guarantee that it would not be repeated, see that?

13 A Yes.

14 Q You told the jury when Mr. Ferguson was
15 asking you questions that that language in that telex
16 where the chairman of BAT Industries told Mr. Weissman
17 that Philip Morris' action made a mockery of industry
18 cooperation, you told the jury that that language you
19 believe is evidence of cooperation regarding this
20 collusion to not advertise health claims, is that
21 correct?

22 A Yes, I think it's evidence of that.

23 Q What you didn't tell the jury is this same
24 very document explains what the word cooperation
25 means, doesn't it?

03728

1 A I think that it's clear from that use of the
2 word and the other discussion that went on in the
3 phone call, and so on, makes it clear at least tells me
4 that's what I think cooperation means.

5 Q Did you read the whole document?

6 A Yes.

7 Q Doesn't the document on its face explain that
8 the cooperation that is being referred to is the
9 cooperation between these companies at this trade
10 association?

11 A I guess I don't see that.

12 Q You don't see that?

13 A I think it's much more consistent with the
14 notion that it makes a mockery of this cooperation to
15 not take competitive advantage of health claims, that
16 was the number one thing, and then you as I said, there
17 is much more to this as it spun out, phone calls were
18 made and people said the CEO of Philip Morris says he
19 understands it's important we agree, that we all hang
20 together on this. When you look at the whole package,
21 that is what the cooperation is, not the cooperation
22 within the trade association but the cooperation not
23 to take competitive advantage of each other.

24 Q Do you mind answering my question?

25 A That's my understanding of what that language

03729

1 means.

2 Q My question was did you fail to tell this
3 jury that in this very same document, this document on
4 its face sets forth that the cooperation that is being
5 talked about is BATCo doesn't want to cooperate with
6 Philip Morris anymore in this trade association, does
7 it say that in the document?

8 A I think what it says is BATCo, as a result of
9 this failure of cooperation, which in my opinion is a

10 failure, as I said, a failure of cooperation on not
11 taking advantage of each other on health claims. As a
12 result of that, BATCo says if Philip Morris is going
13 to fight this way, we're not going to have anything to
14 do with them anymore, and that was a way of getting
15 back at them.

16 Q By the way, did you agree that in the
17 cooperation being referred there is simply BATCo
18 saying if they are going to run ads like that, we're
19 not going to work with them anymore inside the trade
20 association, that's not anti-competitive, is it?

21 A That in itself would not be anti-competitive,
22 it's the agreement, the cooperation that's -- of which
23 a mockery is being made, that's anti-competitive
24 behavior that would have been a way of policing or
25 enforcing the agreement, the cooperation.

03730

1 Q Do you think it's a little unfair to this
2 jury for you to point out this phrase of mockery of
3 industry cooperation, and not show the jury if the
4 document itself actually describes what cooperation is
5 being referred to?

6 MR. FERGUSON: Objection, argumentative.

7 THE COURT: Sustained.

8 BY MR. WEBB:

9 Q Go down, on the same page they describe -- he
10 describes exactly the cooperation they are talking
11 about, doesn't he?

12 A Not in my opinion, but --

13 Q Let's read it.

14 A Okay.

15 Q He says in this memo to all -- this is to the
16 BATCo number ones, right?

17 A Yes.

18 Q That's what this memo is?

19 A Yes.

20 Q Remember, this whole memo, the entire memo is
21 telling the number ones what their relationship is
22 going to continue to be with this trade association,
23 at least that's what the heading says, right?

24 A Yes.

25 Q So this memo is being written to the number

03731

1 ones telling them what their relationship will be in
2 the future with this trade association?

3 A Yes.

4 Q And right here, on nine September, because
5 the primary purpose of Infotab -- that's the trade
6 association, right?

7 A Yes.

8 Q Is to provide a forum on smoking and health
9 issues and to establish the industry's position and
10 credibility in this area.

11 The chairman also sent a telex to Mr. Andrew
12 Reed, chairman of Imperial Tobacco Company in London
13 who is this year's chairman of Infotab, see that?

14 A Yes.

15 Q The telex read as follows, as chairman of
16 Infotab regrettably has to inform you that in view of
17 Philip Morris' advertisement in the Dutch papers on
18 second September, BAT has decided to withdraw from all
19 cooperation with Infotab for the time being.

20 See that?

21 A Yes.
22 Q Doesn't that make very clear that the
23 reference up there to the word cooperation has nothing
24 to do with this collusive agreement and all it is
25 referring to is the cooperation in the trade -- at

03732

1 least that's what the document says on its face?

2 A No, the document used the word cooperation in
3 two places when you look at the whole picture, not
4 just the document but also the phone call between Mr.
5 Bruell of BAT Industries and Mr. Cullman I guess it
6 was of Philip Morris and the rest of this I think that
7 they are using the word cooperation in two different
8 places certainly but I think it seems clear to me that
9 what is at stake here is using health claims to gain
10 comparative advantage and that was the big concern and
11 that this withdrawal from Infotab was a way of getting
12 back at Philip Morris because BAT Industries was very
13 upset that Philip Morris had done that to them, had
14 used an anti-smoking group's statement about how
15 Barclay's measurements were inaccurate to gain
16 comparative advantage -- competitive advantage, excuse
17 me.

18 Q When you told the jury last week that the use
19 of cooperation up here was referring to the collusive
20 agreement but then down here it actually explains on
21 the letter that the cooperation is in the trade
22 association, you at least -- in fairness you should
23 have at least showed the jury that language?

24 A I think they have used the cooperation in two
25 places that --

03733

1 Q Do you think in fairness you should have
2 showed them the language?

3 MR. FERGUSON: Objection, argumentative.

4 THE COURT: Sustained.

5 BY MR. WEBB:

6 Q Let me go on to the next, I'm going to leave
7 agreement number one and move to agreement number two.
8 Are you with me?

9 A Yes.

10 Q You wrote this on the chart as being -- this
11 is a collusive -- I use the word collusive because
12 that's your word, right?

13 It's a collusive arrangement to mislead the
14 public about smoking and health and you wrote the word
15 1953 Plaza, do you remember that?

16 A Yes.

17 Q This is what you say is the second collusive
18 agreement that was entered into between my client and
19 other tobacco companies at the 1953 Plaza Hotel
20 meeting, is that correct?

21 A Yes.

22 Q So I'll ask you questions about that
23 agreement.

24 A Okay.

25 Q When Mr. Ferguson pointed to this agreement

03734

1 here and he asked you a question as to what that was
2 referring to, I'm going -- I think I'm going to say it
3 correct. If I'm wrong, tell me.

4 You testified that at the Plaza Hotel meeting
5 that the industry came up with the idea of having a

6 scientific research organization called the Tobacco
7 Industry Research Committee that was supposed to do
8 legitimate scientific research on smoking and health
9 issues.

10 You testify then that in your opinion the
11 purpose of the Tobacco Industry Research Committee was
12 only to be a public relations front for the tobacco
13 industry and was never intended to get at the truth
14 regarding smoking and health issues.

15 Is that your testimony?

16 A More or less, yes.

17 Q What you told the jury is that this -- well,
18 you actually -- when you drew your cartel -- this is
19 your wheel chart where you drew --

20 A Yes.

21 Q Drew out this, all the totality of the
22 collusiveness called the cartel, is that correct?

23 A Yes.

24 Q You put this research organization, you wrote
25 TIRC, is that correct?

03735

1 A Yes.

2 Q So the jury understands, those are the
3 letters -- TIRC stands for the tobacco industry
4 research committee, is that correct?

5 A Yes.

6 Q You put them right at the center of this
7 collusion?

8 A Yes.

9 Q Now is it your opinion as an economist that
10 this organization, TIRC, was part of this collusive
11 agreement and cartel all way from 1953 up to when,
12 today?

13 A First of all, it changed names.

14 Q I wasn't trying to be -- you wrote CTR. TIRC
15 later changed its name to CTR?

16 A Right.

17 Q When it was formed it was called TIRC?

18 A Right.

19 Q Does it matter what I called it?

20 A So long as we're understanding what we're
21 talking about, not particularly.

22 Q It's the same organization?

23 A That's my understanding.

24 Q At one time called the Tobacco Industry
25 Research Committee, later changed the name to the

03736

1 Council for Tobacco Research, is that correct?

2 A I think that's right.

3 Q My question, is that organization the we'll
4 called it TIRC dash CTR, is it your testimony that it
5 was part of, this TIRC was part of this collusive
6 agreement and cartel from 1954 when it was created up
7 to today?

8 A I'm not sure I could date precisely when TIRC
9 became -- give you precise dates. I do believe over
10 the course of this time it pretty quickly became a
11 piece of the cartel, was used by the firms to mislead
12 the public, was used by the firms as a way to
13 communicate among themselves about, for example,
14 agreement number one, we had up there at least on one
15 occasion one firm used TIRC to tell another company to
16 stop making health claims, as a matter of fact, I think

17 it was Philip Morris that did that and as a general
18 matter to be an industry shield to try to deflect
19 scientific understanding of the smoking and health
20 issue. That is my understanding, yes. Exactly what
21 the dates are is kind of hard to say, so.

22 Q I thought you're the one that dated, it was
23 TIRC was formed as a result of the Plaza Hotel
24 meeting, is that correct?

25 A Yes.

03737

1 Q I thought you wrote on the chart, you wrote
2 down Plaza Hotel?

3 A Yes, I think it had its genesis in the Plaza
4 Hotel meeting.

5 Q Has TIRC continued to be in the center of
6 this cartel since then, for a long time since then?

7 A Yes.

8 Q Before you reached that conclusion and told
9 the jury about it, the conclusion being that TIRC was
10 a public relation front for the tobacco industry and
11 was never intended to get to the truth regarding
12 smoking and health issues. Before you reached that
13 fairly broad conclusion, have you at least examined
14 the scientific research that has been done by TIRC
15 during the past 45 years?

16 A A little bit, although, again I'm not generally
17 in a position to evaluate the science. I can read
18 scientific papers but I'm not in a position to fully
19 understand them.

20 Q But have you actually examined the scientific
21 research that has been done during the past 45 years
22 before you reached your opinion?

23 A Not particularly, no. I'm not -- you could
24 put it in front of me and I didn't really -- I'm an
25 economist, I can't tell you what the science means.

03738

1 I've reviewed the documents in which firms, and
2 lawyers for firms talk about their view of TIRC and
3 CTR but I'm not in a position to be able to evaluate
4 quality of science.

5 Q I'm not asking you to evaluate the quality of
6 science.

7 Before you reached your final opinion that
8 this TIRC was nothing more than a public relations
9 front for the tobacco industry, never intended to do
10 legitimate smoking and health scientific research,
11 don't you think you would look at what they had done
12 to see if it's true?

13 A What I'm trying to say is I could read
14 reports of the TIRC and not know whether those -- I'm
15 going to leave that to the doctors to whether these
16 were really things that helped people to understand
17 the link between smoking and health.

18 What I will say is that there are any number
19 of documents in which members of the industry, lawyers
20 for the industry, companies and so forth, say that
21 TIRC was not doing the right sort of research or
22 enough of the right sort of research, that they had --
23 they were not credible and where the lawyers for the
24 companies lay out precisely why TIRC was arranged the
25 way it was and how it was used to mislead the public

03739

1 and how it was used to shield, to shield results that

2 were favorable -- that were unfavorable to the results
3 from results that were favorable to the industry and
4 so forth.

5 I'm relying on the statements by the industry
6 lawyers and scientists rather than trying to evaluate
7 that science myself, I'm not in a position to evaluate
8 the science myself.

9 Q Would you agree with me as an economist that
10 it's more important to look at what people do as
11 opposed to what people say they are going to do?

12 A You have to understand that you have to be
13 able to make a judgment about what people are actually
14 doing. I'm saying I'm not in a position to make that
15 judgment, have to leave it to the doctors to say what
16 people did or didn't do and whether this was good
17 science or not.

18 I'm not the person to make that judgment, I'm
19 simply relying on what the industry said if was doing
20 with TIRC.

21 Q All I'm saying is that -- you read what
22 people say, all I'm asking is don't you think you at
23 least ought to look and see what CTR actually did
24 before you reach this conclusion that it was a front,
25 a sham?

03740

1 A That language, that sort of language comes
2 from people within the industry. There are people
3 within the industry who say it was a front. The
4 lawyers, Janet Brown, for example, explained how it was
5 set up to be a front. Somebody needs to look at what
6 they did, but I'm not the person to do that because if
7 you put two papers down in front of me or a paper down
8 in front of me that was done by CTR and say did this
9 explain the link between smoking and health, I can't
10 tell you that because I don't know enough about the
11 science. I'm relying on the large quantity of
12 industry documents where people in the industry
13 recognized this did it.

14 Q Did someone prevent you from actually looking
15 at the actual scientific research conducted by TIRC
16 before you reached the final opinions on the collusive
17 agreement?

18 A No, I chose not to look at actual scientific
19 research, I know it's something I can't evaluate.

20 Q If you are not a scientist, if you look at
21 articles and saw that this organization actually did
22 research that concluded that smoking causes disease,
23 directly against the interest of the industry, at least
24 that would tell you that maybe you were wrong about
25 this, wouldn't it?

03741

1 A If I could understand what that research
2 meant and whether it was useful or not, sure, but
3 again there is just vast quantities of statements by
4 the industry, by the industry's lawyers and so forth
5 saying this was designed to be a front.

6 It was, as I said, Philip Morris when
7 American Tobacco -- sorry, US Tobacco sent the letter
8 to the doctors making a comparative health claim,
9 Philip Morris wrote, CEO for Philip Morris wrote to
10 the head of TIRC and said that this US Tobacco health
11 claim, this Dear Doctor letter is -- given I can't
12 remember the exact language but along the lines of

13 making a mockery of the industry cooperation that we
14 have been trying to establish for the last 40 years
15 and that -- can't you please write to the president of
16 US Tobacco and tell him to stop that, to me is not
17 indicative of using TIRC to do science, it's
18 indicative of me of using TIRC as a conduit for Philip
19 Morris to tell US Tobacco to stop cheating on the
20 agreement which they seem to have been trying to
21 develop over the last 40 years, that sort of set this
22 straightforward on its face.

23 I can evaluate that as an economist, I can't
24 evaluate a paper on the science of smoking, I don't
25 know enough about it.

03742

1 Q As an economist if you actually see evidence
2 that CTR was not a front, that it actually did a lot
3 research, wouldn't that help you reach a different
4 conclusion on number two?

5 A It would depend.

6 Q Would it help you?

7 A It would certainly depend but I'm not the
8 person to judge whether - how much research was
9 valuable along what line, I'm simply relying on, as I
10 say, the vast quantity of statements by people in the
11 industry who explained the purpose of TIRC as a public
12 relations shield for the industry and the way it was
13 used to shield the science, to split off the science
14 that was not favorable from the industry's standpoint
15 and the science that was and to hide the stuff
16 unfavorable behind legal privilege, all that sort of
17 stuff that I can understand as an economist.

18 It's up to the scientist to tell you how much
19 of the money they spent was on research that really
20 helped to establish the link between smoking and
21 health and had any, if any, impact on designing a
22 safer product.

23 Q You don't mind telling the jury here what you
24 do know about what CTR did, do you?

25 A No.

03743

1 Q If you had wanted to find out before you
2 reached the opinion that you told the jury about that
3 it was just a front, one thing you could have done is
4 look at the surgeon general reports that have been
5 prepared over the years to see if the surgeon general
6 believed that the TIRC was doing meaningful research,
7 couldn't you?

8 A I suppose, depends on what level of
9 understanding of the science, what level -- excuse me,
10 what level of understanding of the science was
11 required.

12 Q If you saw, for example, that the surgeon
13 general of the United States frequently cited research
14 done by TIRC to support the conclusions reached by the
15 surgeon general that smoking is dangerous to health,
16 at least that would help you maybe come to a different
17 conclusion that maybe this wasn't just a front,
18 wouldn't it help you do that?

19 A You would have to put that in the context of
20 all of the research that TIRC was doing and I'll leave
21 it at that, have to put that in the context of all
22 research TIRC was doing and I guess I really need the
23 scientist to tell me what fraction of it was valuable

24 and what fraction wasn't, but I keep coming back to
25 the document.

03744

1 Q I know you don't mind talking about, talking
2 about what CTR actually did, do you?

3 A I'm not in a position to evaluate what
4 fraction of the work was beneficial to smoking and
5 health and what wasn't.

6 Q We'll try to do that to see if you change
7 your opinion before you leave here.

8 I, last night, drew -- let me -- before you
9 reached your conclusion that this TIRC CTR is just a
10 front did you at least try to understand how it was
11 structured?

12 A I have a rough idea of how it was structured,
13 yes.

14 Q I drew this out on a chart so I wouldn't have
15 to draw it here today, to save time. This is my
16 drawing and I won't adopt it as yours, let's go
17 through and see if you understand this to be the
18 general understanding of the organization called TIRC
19 and CTR.

20 This thing called TIRC was an idea that came
21 out of the Plaza Hotel meeting, is that correct?

22 A That is my understanding, yes.

23 Q It was announced in January 1954, is that
24 correct?

25 A I believe so.

03745

1 Q And TIRC stands for Tobacco Industry Research
2 Committee, later called it -- changed to CTR, called
3 Council for Tobacco Research?

4 A Yes.

5 Q You understand from the time it was first
6 formed up to the current time it has been exclusively
7 funded by financing from the tobacco companies, is
8 that correct?

9 A That is my understanding.

10 Q That's why I've drawn the arrow here to
11 illustrate that, is that correct, okay?

12 A Okay.

13 Q The organization itself, TIRC later CTR,
14 actually had what is known as a scientific director,
15 is that correct?

16 A Yes.

17 Q There was some staff affiliated with the
18 scientific director, is that correct?

19 A I would believe so.

20 Q Then within the structure of TIRC there
21 actually was board called the scientific advisory
22 board which I've abbreviated by the letters -- I think
23 it's called SAB, is that correct?

24 A Yes, I've seen that reference.

25 Q And as far as the structure of the scientific

03746

1 director, the person who was going to be the
2 scientific director, the idea was that was supposed to
3 be someone who would be chosen who had a strong
4 background in the scientific world, is that correct?

5 A Yes.

6 Q Then the members of this SAB, called the
7 scientific advisory board, the idea was there was --
8 those were supposed to be people that were independent

9 scientists from different fields of science, is that
10 correct?

11 A That's certainly how it was set out, yes.

12 Q This board called the scientific advisory
13 board over the years has varied somewhere between 8 to
14 15 or 16 members, is that correct?

15 A I don't know the numbers but I'll take your
16 word for it.

17 Q The job of the scientific advisory board that
18 is composed of this independent scientist was they
19 were actually supposed to receive proposals to do
20 scientific research in the field of smoking and health
21 from other independent scientists throughout the
22 United States who wanted to do search certain
23 research, is that correct?

24 A Then supposed to evaluate proposals to do
25 research, yes.

03747

1 Q The idea was that throughout this great
2 country we have universities, scientific organizations
3 spread throughout the United States is that correct?

4 A I won't disagree with that.

5 Q The idea was that these independent
6 scientists, if they had an idea or proposal of some
7 type of smoking and health research they wanted to do
8 they could submit an application, if you will, to the
9 SAB and a proposal and explain what it is they were
10 proposing to do, is that your understanding?

11 A I believe that's correct.

12 Q And then the SAB which had these scientists
13 on it, it was supposed to review those applications
14 and decide which research that the TIRC was actually
15 going to finance by giving money out to these
16 scientists, is that correct?

17 A Yes, although my understanding is what they
18 wanted to focus on was not the links between smoking
19 and health but simply on cancer itself, they really
20 wanted to focus on basic cancer research rather than
21 smoking and cancer. That was part of the goal of
22 TIRC.

23 Q Actually the independent scientists make the
24 proposals for what they at least say they are going to
25 do, is that correct?

03748

1 A That's correct.

2 Q My understanding is it's up to the advisory
3 board to decide which proposals to fund.

4 A That is my understanding.

5 Q If they decided to fund it, it's funded with
6 tobacco company money?

7 A Yes.

8 Q As far as this collusive agreement that
9 existed for all these years, I take it that the person
10 who served as the scientific director all these years,
11 that person had to be involved in this collusion in
12 order for this to be a sham all these years?

13 A I think somebody, whoever made the decisions
14 said -- there is a document, there is a letter from
15 the president of Lorillard who says that basically
16 they had abdicated the responsibility to the lawyers
17 and taken it away from the scientists.

18 So the question is how much power the
19 scientific director had versus ultimately how much

20 power the lawyers had in deciding what would or would
21 not be done.

22 Q If this organization was a sham for all these
23 years, wouldn't the person as scientific director have
24 to be in on it, wouldn't he?

25 A You would have to chose the right scientific
03749

1 director.

2 Q Then he would have to join the conspiracy?

3 A Find a director who wanted the research you
4 wanted to do. I think the documents were clear in
5 that there was a lot of caution in who was chosen.

6 Q Whoever this person was became part of this
7 conspiracy, this collusion?

8 A Interesting question.

9 Q Strike the question.

10 Wouldn't it be pretty difficult to have an
11 organization be a sham for 45 years and not have the
12 person who is the scientific director of the
13 organization be involved in the conspiracy, the
14 collusion?

15 A I think you would need to find the scientific
16 director who was right-minded, shall we say, who wanted
17 to do the basic research that's the goal of the sham
18 and that was one of them, to focus on the disease and
19 not the link between smoking and the disease, and if
20 you found the scientific director who was more
21 interested in the disease rather than the link between
22 smoking and the disease, that would be advantageous.

23 Q By the way, I take it these men and women
24 that were the scientists who were on the SAB, they had
25 to be in on the plan also?

03750

1 A For example, you would want to be very
2 careful that you didn't have an anti-smoking person
3 running this organization because what they might want
4 to do is a very different kind of science than the
5 organization was designed to do, it was planned to do.

6 Q But if it's just a sham and they are not
7 doing any meaningful research, the people, the men and
8 women who were on the SAB would have to be in on the
9 gig, right?

10 A You would want to select them very
11 cautiously.

12 Q And they would be willing to be used in the
13 collusive arrangement?

14 A As I say, there is a lot of different science
15 to be done, some useful for smoking and health, some
16 useful for understanding cancer, and scientists want
17 to understand cancer, too.

18 The industry said publicly was what it was
19 interested in was the link between smoking and health
20 but privately what it said was what it really was
21 going to do was investigate cancer rather than smoking
22 and cancer and I think if you found the scientific
23 advisory board, if you populated the board with people
24 interested in researching cancer as opposed to the
25 link between smoking and cancer they would have is

03751

1 very different view point as to what science they
2 wanted to do.

3 Q Based on your testimony the men and woman who
4 would serve on the SAB would have to be people who

5 never intended to get at the truth regarding smoking
6 and health issues, is that correct?

7 A No, I wouldn't characterize it that way.

8 Q That's what you told us you thought the
9 conclusion was?

10 A I think that's the way the industry felt
11 about it but the industry didn't want to get at the
12 truth of smoking and health.

13 Q But if these men and women that served on the
14 SAB wanted to get at the truth concerning smoking and
15 health, that would upset the whole collusion?

16 A What you want to do is select people who are
17 interested in researching the disease rather than the
18 link between smoking and the disease and tell them you
19 want to do research on the disease, there is good
20 science, I'm not suggesting that science having to do
21 with cancer is unimportant, there is perfectly good
22 science having to do with cancer.

23 Cancer is something we don't fully
24 understand, my understanding of it, not being a
25 scientist. But that the public statement was that the

03752

1 TIRC would get at the link between smoking and cancer
2 but the documents indicate that as an strategic matter
3 what the industry wanted to do was to research the
4 disease, not the link between smoking and the disease
5 in order to delay figuring out -- in order to delay
6 anyone finding out the truth about smoking and cancer.

7 I think this is a lot like you have an
8 automobile company, they discover that when their cars
9 are struck from the rear, the gas tanks explode. So
10 you say, look, we take this very seriously, we'll set
11 up a research organization to sort this out.

12 The first thing we'll do is figure out -- a
13 lot of time figuring out how fire works because we
14 really don't fully understand fire. Then once we
15 understand how fire works, we'll get around to the
16 link between auto crashes and autos catching on fire.
17 They said publicly they wanted to research the
18 question of smoking and cancer.

19 Q They being the industry?

20 A Yes. But in fact the documents indicate that
21 as an strategic matter what they wanted to do was
22 focus on cancer so that they could delay getting at
23 the link between smoking and cancer.

24 And if you choose a scientific advisory
25 board, if you choose a scientific advisory board that

03753

1 is interested in researching cancer, there are
2 certainly any number of independent scientists that
3 want to do research on cancer and get their research
4 funded and they would want to apply to that board.

5 THE COURT: Take the morning recess.

6 (At this time a short break was taken.)

7 THE COURT: Please sit down.

8 MR. WEBB: May I proceed, your Honor?

9 THE COURT: Yes.

10 BY MR. WEBB:

11 Q Doctor, I am going to move on. I would like
12 to make sure I get an answer to the question I was
13 asking you at the time we recessed.

14 Is it your testimony that the members of the
15 scientific advisory board were part of the collusive

16 agreement, to use your words, the collusive agreement,
17 to use CTR as a public relations front? Were they
18 part of the collusive agreement?

19 A I don't know that I would say that they were
20 knowingly part of the collusive agreement. I think
21 that the collusive agreement really -- members of the
22 scientific advisory board are not selling cigarettes.
23 They are not in the market for cigarettes. I think
24 the tobacco companies are part of the collusive
25 agreement. I think they chose the members of the

03754

1 scientific advisory board with their goals in mind.
2 The documents make it quite clear that they chose
3 people with their goals of not revealing everything
4 there was to be known about the safety -- the health
5 aspects of smoking in mind.

6 Q So the answer is, these people were involved
7 for forty-five years in using this as a front and they
8 didn't know about it?

9 A I think they were -- I think they were
10 selected -- yeah, I think they were selected
11 carefully. You would not want -- for example, you
12 would not want to pick Dr. Wynder to be on that
13 committee because he was not likely to support the
14 kind of research that the industry was interested in
15 having done.

16 Q I'm sorry. So they did know they were being
17 used as a front for the tobacco --

18 A No. I think they simply selected scientists
19 who were interested in researching the disease as
20 opposed to the link between smoking and cancer by and
21 large. Later on they developed the special -- the
22 lawyers' special projects arrangement --

23 Q Doctor, can you answer my question?

24 Judge, respectfully, I am interrupting only
25 because I am trying to move this along.

03755

1 THE COURT: Why don't you ask the question
2 again.

3 BY MR. WEBB:

4 Q All I am asking is, and if you can answer it
5 yes or no, is it your testimony that the members of
6 the SAB were not -- did not knowingly participate in
7 using the CTR as a front for the tobacco industry?

8 A I think I would say that they did not
9 knowingly -- I have seen nothing to suggest that they
10 knowingly -- that the members of the SAB knowingly
11 took part in that. I think it is the industry that
12 was colluding.

13 Q And the scientific director, the person who
14 served as the scientific direct for, and it changed
15 over the years, is it your testimony that that person
16 was knowingly part of the collusion to use CTR as just
17 a front for the tobacco industry?

18 A No. I think I would say pretty much the same
19 answer, that I don't think -- I see nothing to
20 indicate that the scientific director knew that the
21 CTR, TIRC was being used to mislead the public. It
22 was the industry wanted to mislead the public and they
23 wanted to be very careful about who they chose as a
24 scientific director, so they got the right person -- I
25 have no evidence that the scientific director knew

03756

1 that he was part of a conspiracy.

2 Q And if that's the case -- just tell me,
3 Doctor, how can it be that this organization could be
4 used to do sham research for forty-five years and the
5 person running the organization would never know about
6 it?

7 A It was not that it was fake research. The
8 research itself might well have had scientific value,
9 and might have been -- in fact, as I understand it,
10 some of it was quite good science. It wasn't the kind
11 of research that was needed in order to understand the
12 link between smoking and cancer. And the documents
13 make quite clear that that was -- that was intentional
14 from the start, that the idea was to research the
15 disease, not to research the link between smoking and
16 cancer. And by doing so, to delay finding out and to
17 be able to have things to say in the scientific
18 debate, to be able to continually raise the question
19 that we don't fully understand the disease
20 and therefore we can't know that smoking really causes
21 cancer and so forth, in order to muddy the waters and
22 mislead the public.

23 Q Just so I understand, Doctor, where did you
24 come up with the idea that these men and women that
25 were involved in making decisions about what science

03757

1 to fund, where did you get the idea that none of this
2 research had anything to do with linking smoking to
3 disease? Where did you get that idea from?

4 A I don't get the idea -- I didn't say that
5 those people had that idea. It was that the companies
6 had that idea, and that the companies' lawyers
7 expressed that idea quite clearly.

8 Q What -- did the research actually go forward
9 that showed the link?

10 A I can't tell you. I will say this again. I
11 can't tell you -- you really should ask somebody like
12 Dr. Henningfield, who understands scientific -- the
13 scientific research, who you can put papers in front
14 of him and say, does this paper establish a link or
15 not establish a link. I am not a person who can
16 understand that.

17 Q No, but Doctor, you are the one who told this
18 jury about this collusive agreement to use CTR, you
19 are the one that told them, right?

20 A Yes. In the industry documents and -- the
21 industry's documents and the statements by industry
22 lawyers make that patently obvious to me. Now, you
23 seem to want to say, well, then I ought to be able to
24 evaluate the science and say which of the science was
25 misleading and which isn't. I can't do that.

03758

1 But the documents make it patently obvious to
2 me that is what was going -- the intent of this was.

3 Q Let's see actually if you can do this,
4 Doctor. Let me show you what is marked as Defense
5 Demonstrative Exhibit 5210. Let me see if you can
6 understand if, if you had looked at that before you
7 gave your testimony. These actually -- so you know
8 what you are looking at.

9 This is a summary of certain articles --
10 certain scientific research that has been funded by
11 this sham organization. Are you with me?

12 A You are telling me that. I will take your
13 word for that.

14 Q This is in evidence, Doctor. Okay?

15 A Okay.

16 Q Let's just look at it for a moment so we can
17 see if you would have been able to understand it if
18 you had looked at it. The first one I will call to
19 your attention -- early on article of 1957 by a
20 scientist named Dr. H.R. Pratt-Thomas who was funded
21 to do a research project for -- funded by tobacco
22 through CTR as a grantee under the SAB program.

23 Are you with me?

24 A I will take your word for that.

25 Q And do you see where he concludes in his

03759

1 scientific research, the bronchial trees -- you
2 understand at least that is referring to the lung?

3 A Loosely, yeah.

4 Q Just loosely. Let's read it together,
5 Doctor.

6 A Go ahead. I have read that one as we sit
7 here and have no idea what conclusion one ought to
8 draw -- I don't know what squamous means, I don't know
9 what metaplasia means.

10 Q You do know what that means, don't you?

11 A I have no concept of what the significance of
12 that is or isn't.

13 Q We will go through it, because the point you
14 were making is that you understood that CTR didn't do
15 any research to connect smoking to disease.

16 A No. That is a mischaracterization.

17 Q Didn't you just tell the jury that?

18 A No, that is a total mischaracterization of
19 what I just said.

20 Q I'm sorry. This was a collusive agreement --
21 you told the jury this was a collusive agreement to
22 use CTR as a public relations front for the tobacco
23 industry, and never get to the truth regarding smoking
24 and health.

25 Is that your testimony?

03760

1 A Yes. I think it is quite clear to me that
2 they -- that the intention of CTR was to -- and TIRC
3 was to research the disease, not the link between
4 smoking and cancer. Later on, to divide research
5 results that were favorable and unfavorable and hide
6 the ones that were unfavorable to the industry behind
7 the shield of legal -- of lawyer -- legal privilege,
8 lawyer's privilege. That's quite clear to me.

9 What I have said before, I think they may
10 well have done some good science, but I can't tell you
11 what good science is, and they may have well done some
12 science that had some link, but I can't evaluate for
13 certain what all that means. To take one sentence out
14 of a scientific document and present it to an
15 economist and say, you understand the scientific
16 implications of this, seems to me just silly.

17 Q Wouldn't you want to know that before you
18 came before a jury and told the jury it was a public
19 relations front?

20 A The industry's own documents make it clear to
21 me that the industry and the lawyers felt it was
22 believed, in fact planned for it to be a public

23 relations front.
24 Q Let's just read the first one off to make
25 sure you have an understanding of what it says here.
03761
1 It says, the bronchial trees of smokers. You
2 understand those words, the bronchial trees of
3 smokers?
4 A I know that the bronchia has something to do
5 with the lungs. I have no idea what the bronchial
6 tree is.
7 Q Something to do with the lungs of smokers, is
8 that right?
9 A Yes.
10 Q Manifest. You understand what that word
11 means?
12 A Yes, vaguely. Yeah.
13 Q Manifest roughly doubled the incidence.
14 Do you understand that phrase?
15 A I think I have a layman's understanding of
16 that phrase.
17 Q Double the incidence of pre-cancerous.
18 Do you understand what the word pre-cancerous
19 means, something that occurs before cancer occurs?
20 A Yes.
21 Q So apparently this is double the incidence of
22 pre-cancerous. So you don't know the next phrase?
23 A I have no clue.
24 Q That's okay. You don't know that phrase.
25 As those of nonsmokers.

03762
1 Do you see that?
2 A I do.
3 Q Wouldn't that at least indicate to you,
4 Doctor, in being fair, that this doctor has come to
5 the conclusion that the lungs of smokers have doubled
6 the incidence of certain pre-cancerous cells of those
7 of nonsmokers?
8 A I don't even know if it has anything to do
9 with cells. Is it a squamous metaplasia -- I'm sorry.
10 It is one sentence that -- what I presume is a much
11 larger document. And I have no idea what the
12 scientific consequence or relevance or significance of
13 that statement is.
14 Q Let's go to the next one and see it will make
15 it easier for you.
16 The next one is a study funded by CTR for a
17 scientific study carried out by a Dr. E. D. Warner.
18 Can you see that okay?
19 A Yeah.
20 Q Dr. Warner -- another earlier study back in
21 1961, in which he concludes there is a significant
22 relationship between smoking and bronchiogenic
23 carcinoma.
24 Do you see that?
25 A Sure.

03763
1 Q Would you at least be able to tell the jury
2 that you understand that this scientist reached a
3 conclusion that was complete -- strike the question.
4 This scientist clearly reached a conclusion
5 that there is a significant relationship between
6 smoking and cancer. You at least understood that?
7 A Again, to take this one statement out of an

8 entire scientific document and ask me to judge what
9 the scientist consequence or significance or
10 importance of that is -- the next sentence might well
11 say, however, this has nothing to do -- or however, it
12 has not been established in any way that smoking
13 causes cancer. I don't know what this guy is
14 concluding. I certainly know -- I will take your word
15 for it, that he wrote that sentence in a scientific
16 report.

17 But beyond that, I have no idea what his
18 conclusions were, the whole conclusion of his research
19 or anything like that.

20 Q But, Doctor, we are testing your opinion that
21 you have given this jury that this organization was a
22 public relations front and did not ever get at the
23 truth of smoking and health.

24 A Quite frankly, Mr. Webb, I think you are
25 testing my understanding of the science. And I quite

03764

1 frankly will admit to you I don't I don't know what
2 the science means.

3 Q If it turned out, Doctor, the CTR did an
4 enormous amount of research in smoking and health
5 showing a link between disease and smoking, that would
6 explode your entire theory of collusion?

7 A We would then have a really interesting
8 puzzle as to why the lawyers in the industry and the
9 CEOs of the companies and so forth said that they felt
10 that the purpose of TIRC and CTR was to serve as an
11 industry shield, that it lost its credibility
12 eventually by repeatedly saying, no, no, no, there is
13 no link, that it was designed to use research on the
14 disease to confuse the question of a link between
15 smoking and cancer. That would be very puzzling,
16 wouldn't it?

17 Q Would you have liked to have seen some of
18 this before you reached your conclusions before this
19 jury?

20 A I have told you many many times as you showed
21 me this, I do not know for certain what the
22 consequence -- what the importance of these statements
23 are. To take one line out of a study of the trachea
24 bronchial epithelium and changes related to smoking,
25 and to say that is a conclusion -- I have no idea what

03765

1 that paper --

2 Q If I am taking this out of context, Mr.
3 Ferguson can ask you questions. Do you understand
4 that?

5 A Sure. All I am saying is you have given me a
6 sentence from a paper and said there is a conclusion
7 there, isn't there? And I have no idea what Dr. E. D.
8 Warner concluded.

9 Q I'm sorry. I am representing to you this is
10 what he concluded. Do you see this?

11 A Yes, I see it.

12 Q And so when you see that he -- he was funded
13 by CTR -- would you agree that that is a conclusion
14 that links smoking to a disease?

15 A I don't even know that that is his
16 conclusion. That is a statement -- one sentence taken
17 out -- as I said, the industry has had no trouble
18 saying, even though there is statistically -- excuse

19 me, statistically significant relationships in
20 epidemiological studies that you can't really learn
21 anything from epidemiology. That's a position they
22 have taken that it is only statistics.

23 Without being able to read the rest of the
24 paper -- and I'm not sure I am in a position to read
25 the rest of the paper. I don't know what he

03766

1 concluded. I will take your word for it that he wrote
2 that sentence down. But whether that sentence fairly
3 states what his conclusions are about smoking and
4 health, I can't tell you. I think if you gave me the
5 entire paper I wouldn't be able to understand that,
6 either.

7 Q I may have it here. Let me ask you -- show
8 you his actual paper, since you mentioned it. I am
9 just trying to show whether or not you could have
10 figured this out before you gave this jury this
11 opinion. I happen to have the actual paper here. It
12 is marked in evidence as Defense Exhibit MP5316, in
13 evidence. It is that very article.

14 Do you see that article there, sir?

15 A Yes.

16 Q That is the article by these doctors,
17 including Dr. Warner. Do you see him there?

18 A Yes.

19 Q And actually to show you --

20 A It is from Iowa City.

21 Q Do you recognize that?

22 A I recognize Iowa City, you bet.

23 Q You consider that to be an honorable -- is
24 that the university -- are they from the university?
25 I haven't looked at that. Do you recognize their

03767

1 names?

2 A No.

3 Q But just so you see --

4 A It is highly likely they are from the
5 University of Iowa, because I don't think the private
6 Catholic hospital was doing this kind of work in 1961.

7 Q You said they are from --

8 A I would bet they were. I wasn't there in
9 1961, so it could --

10 Q It is an honorable institution, anyway?

11 A I would like to think so.

12 Q I am going to show you the actual last page
13 so there is no question this is the conclusion they
14 drew after doing this. A conclusion that is very
15 harmful to the tobacco industry, don't you agree?

16 A significant relationship was demonstrated
17 between smoking -- you understand that, don't you?
18 Just the first phrase, you understand up to the comma?

19 A I think so, yeah.

20 Q The amount and degree of a typical
21 metaplasia. You may not understand metaplasia, you
22 told us?

23 A Right.

24 Q It doesn't look good, though, does it?

25 A Beats the heck out of me.

03768

1 Q And the incidence of bronchiogenic carcinoma
2 lung cancer?

3 A You are telling me that bronchiogenic is lung

4 cancer? I will take your word for it. I'm sorry.
5 This is not my language.
6 Q All right. That's what it means. But I will
7 tell you what -- the fact that you are being told that
8 smoking causes bronchiogenic carcinoma isn't a very
9 good thing?
10 A It doesn't say smoking causes. It says there
11 is a significant relationship.
12 Q Do you find that -- isn't this the type of
13 research that the tobacco industry was never supposed
14 to do under your collusion theory?
15 A I don't know what kind of research they did
16 here. I can't tell you -- you show me again now that
17 sentence from the paper --
18 Q No, but you said I took it out of context?
19 A So now you have shown me the very last
20 sentence of the paper. I don't know what the rest of
21 their findings were. Again, as I say, if you hand me
22 the paper, I probably won't be able to understand it.
23 Yeah, you have now shown me it is a sentence in the
24 paper. Where it is in context, I don't know yet. It
25 is still just a sentence standing by itself.

03769

1 Q By the way, do you find most people when they
2 write a paper, though, put the conclusion at the end so
3 we know what their conclusion is?
4 A We usually put our concluding section at the
5 end.
6 Q You are not doubting this is the conclusion,
7 are you, Doctor?
8 A What I am saying is, I am not in a position
9 to judge what they are saying.
10 Q Would you like to look at the document?
11 A I am willing to look at it. In all
12 likelihood I am will not be in a position to tell you
13 what it means.
14 Q It is marked MP5316. And if there is
15 anything in there that shows that this was sham
16 research or public relations front, can you tell us
17 about it.
18 A By the way, it is not from the University of
19 Iowa. It is from the Iowa City Veterans
20 Administration Hospital. And I should have thought of
21 that one. I'm sorry I missed that one.
22 I'm sorry.
23 Q I am just asking, do you see any indication
24 this is sham research?
25 A No. I imagine this is serious research. I

03770

1 won't -- I have no doubt about that. I am just not in
2 a position to evaluate --
3 Q Does it surprise you that the tobacco company
4 funded that research, that negative to the tobacco
5 industry?
6 A I don't know how negative this is or isn't.
7 I will leave it to the doctors to determine whether
8 this was a negative or very negative -- I really -- I
9 don't know.
10 Q Let's look at the next one. The next one on
11 this chart, it says chronic smokers -- you understand
12 what the word chronic means?
13 A I believe so.
14 Q Chronic smokers are more likely to develop a

15 greater incidence of coronary disease -- you
16 understand what coronary disease is, heart disease?

17 A Broadly, yeah.

18 Q Chronic smokers are more likely to develop a
19 greater incidence of coronary disease at an earlier
20 age, and manifest a higher incidence of coronary
21 artery occlusion.

22 Do you see that?

23 A Yes.

24 Q Do you understand what that is saying?

25 A Not entirely.

03771

1 Q The idea that people who smoke are more
2 likely to develop more heart disease, is that hard to
3 understand, that finding?

4 A I don't know what is missing in the dots,
5 but, no, taking that sentence just as it is, that
6 seems to say what it says.

7 Q That's not very helpful to the tobacco
8 industry, is it?

9 A It depends on what the rest of the document
10 -- the next sentence could start but. I have no idea
11 what the ultimate conclusion of that statement --

12 Q Even if there was a but after that, the fact
13 that these researchers came to that conclusion
14 connecting smoking to heart disease is not very
15 helpful to the tobacco industry, is it?

16 A No, not necessarily.

17 Q Not necessarily?

18 A No, it is not. If that were the ultimate
19 conclusion, that probably --

20 Q How about the next one. This was actually
21 1965, a study funded by this sham organization, CTR,
22 by Dr. Hester on the relationship of smoking to the
23 outcome of pregnancy. A significant decrease in birth
24 weights of infants born to mothers who smoke was
25 found. Do you see, that sir?

03772

1 A Um-hum.

2 Q Do you understand what that is saying?

3 A I think, yeah.

4 Q By the way, connecting smoking to low birth
5 weight is not a very good thing to the tobacco
6 industry, is it, sir?

7 A I don't know. Again, you are asking the
8 wrong person. It doesn't sound great to me. But you
9 should really ask the doctors -- it could be related
10 to other things. I just don't know.

11 Q How about this next one? This is another
12 research funded by this organization, CTR, or TIRC,
13 1963, called the addictive aspects of heavy smoking.
14 Do you see what the --

15 A See the title, yes.

16 Q This statement by Dr. Knapp, heavy cigarette
17 smokers thus appear to be true addicts, showing not
18 only social habituation but mild physiologic
19 withdrawal effects.

20 Do you see that?

21 A Yes.

22 Q And would you agree that that does not appear
23 to be a very helpful finding to the tobacco industry?

24 A Yeah, it probably wouldn't be.

25 Q Are you surprised that CTRs funding that type

03773

1 of research based on your theory of collusion?

2 A It certainly doesn't have anything to do with
3 cancer, the last three have nothing to do with Dan
4 cancer, which was the big fear. But in any event, no,
5 it doesn't surprise me at all. They did a variety of
6 research.

7 Again, I can't tell you -- you have taken one
8 sentence, it says thus appear, my understanding the
9 industry denies to this day, in fact I think I was
10 here when Dr. Henningfield talked about addiction, and
11 the industry denies to this day that it is addictive.
12 This doesn't seem to be very good.

13 Without seeing the whole thing -- again, not
14 being really in a very good position to evaluate the
15 whole piece of research, it does not appear to be very
16 good, that one sentence, I will grant you that.

17 Q Let's look at some more. I am now going to
18 show you what is marked as demonstrative Exhibit 5211
19 in evidence. These are some more findings published
20 by CTR grantees.

21 Do you see the heading, sir?

22 A I see your heading, yes.

23 Q Let's look at this one. This is 1969, a
24 study on the association of cigarette smoking with
25 coronary and aortic arteriosclerosis.

03774

1 Do you see that?

2 A Yes.

3 Q Do you generally understand that to be
4 referring to heart disease?

5 A I know that coronary has something to do with
6 the heart.

7 Q Have you heard of arteriosclerosis, hardening
8 of the arteries, you have never heard of that?

9 A I have heard of arteriosclerosis. I don't
10 know the details. That is arthrosclerosis.

11 Q You don't know what the details --

12 A I don't know what arthrosclerosis is.

13 Q Smoking, or an associated factor, affects the
14 development of mural arthrosclerosis, and the apparent
15 relationship of smoking to CHD, coronary heart
16 disease, is not limited to the events surrounding the
17 terminal occlusive episode.

18 Do you see that, sir?

19 A I do.

20 Q Does that appear to be connecting smoking to
21 heart disease?

22 A I have no idea what conclusion I am supposed
23 to draw from that.

24 Q None at all?

25 A I don't know what the associated factor could

03775

1 be. I don't know what mural arthrosclerosis is. And
2 I don't know what the terminal occlusive episode is.
3 I am really not the person to tell you what that
4 sentence means at all.

5 Q You have no hint at all that is a finding
6 that is adverse to the tobacco industry?

7 A I really do not know what that sentence
8 means, even as it sits there, much less what the
9 conclusions of the entire paper would be from that one
10 sentence.

11 Q Let's see how the next one -- if this is as
12 equally hard for you to understand.
13 Emphysema. You know what that is?
14 A Yeah, vaguely.
15 Q You understand that's a lung disease?
16 A Yes, I do understand that is a lung disease.
17 Q Emphysema in smokers might be due in part to
18 local suppression of elastase inhibition in the lung
19 by cigarette smoke.
20 Do you see that?
21 A Yes.
22 Q Do you understand what that is saying?
23 A I understand what the sentence says, except I
24 have no idea what the suppression of elastase
25 inhibition is. I don't know -- local suppression of
03776
1 elastase inhibition, I have no know idea what that
2 means.
3 Q Does that appear to be connecting the disease
4 of emphysema to smoking?
5 A Again -- yeah. Taking that one sentence
6 there, it certainly seems to be pointing somewhere in
7 that direction. But I am not the right person to ask.
8 Q Let's look at the next one. This is research
9 funded by the same organization, CTR. This is 1979 by
10 a scientist named G. D. Friedman. Mortality in Middle
11 Age Smokers and Nonsmokers.
12 Do you see that?
13 A Yes.
14 Q I will read this over.
15 Accounting for forty-eight other
16 characteristics, both individually and in combination,
17 failed to eliminate the association of smoking with
18 mortality -- that means death, you understand that?
19 A I do understand that.
20 Q -- smoking with death from all causes or
21 mortality from coronary heart disease.
22 Do you understand what is being said there?
23 A Not entirely. My interpretation of that is
24 that -- basically they went and looked for a bunch of
25 other things that might have caused smoking rather
03777
1 than -- sorry, caused death from all causes or death
2 from coronary heart disease.
3 At least the forty-eight they found after
4 they have controlled for the forty-eight they found
5 they still could not eliminate the possibilities there
6 was a link between smoking and mortality from all
7 causes.
8 Q It says possibility. Even looking at all
9 these other factors --
10 A Forty-eight other factors.
11 Q -- they still came to the conclusion that
12 smoking is associated with death from all causes?
13 A They failed to eliminate the association.
14 There is a distinction in science between proving that
15 something happened and not having proved that it
16 doesn't happen.
17 Q But you agree that is not a very helpful
18 finding to the tobacco industry, Doctor?
19 A Again, I can't tell you what the overall
20 conclusion of the paper is without knowing what the
21 rest of it is. That sentence itself does not seem to

22 be very helpful to the tobacco industry.
23 Q That sentence says smoking will kill you --
24 A No.
25 Q -- doesn't it?

03778

1 A Again, based on what I know about this, which
2 is not great, but what I do know about statistics is
3 it doesn't say that smoking will kill you. It says,
4 we looked at a bunch of other things -- what it says
5 -- as best as I can tell, and, again, I am not the
6 person to be making these judgments, but there is a
7 statistical link, a statistical association even
8 between smoking and death from all causes, or smoking
9 and coronary heart disease. And this is the sort of
10 thing the industry has said in the past, maybe it is
11 just a statistical relationship. Maybe it is just
12 that people who smoke and people who die from heart
13 disease or cancer or something else have some other
14 thing in common. Maybe it is genetic, maybe it is
15 something else. So they started looking, and they
16 looked at forty-eight other things and they couldn't
17 eliminate -- they basically eliminated those
18 forty-eight things, but there might be something else
19 that was common to smokers and people who had heart
20 disease.

21 Again, you are getting -- this does not prove
22 -- to say that something has failed to eliminate an
23 association is not the same thing as something has
24 proven the association. Failing to eliminate is still
25 an open question. Proving is something else.

03779

1 Q I'm sorry. Go ahead.
2 A It doesn't sound like it is a very good
3 result for the tobacco industry, that sentence by
4 itself, because at least it says of all the various
5 things that might be causing -- that might be causing
6 the statistical link between smoking and coronary
7 heart disease, these forty-eight aren't it. But it
8 doesn't go on to say, now we have shown -- because
9 these forty-eight aren't it, it has got to be smoking.
10 That conclusion just doesn't follow as a matter of
11 statistics.

12 Q Does it surprise you that this so-called sham
13 organization, CTR, funding research came out that
14 negative to the tobacco industry?

15 A Again, without seeing the whole thing and
16 understanding the whole paper, I don't really know
17 what the ultimate conclusion of that paper is.

18 Q I am going to recommend to you that is the
19 conclusion. Does that surprise you?

20 A No, not particularly.

21 Q I'm sorry. I thought you said under this
22 collusive arrangement CTR was not to ever get to the
23 truth of smoking and health.

24 A I think they were going to try to avoid that
25 as best they could. Eventually they started figuring

03780

1 out that sometimes things got published that didn't go
2 their way and so they started taking control of the
3 right to decide who would publish and who wouldn't.
4 Eventually they set up the lawyers' special projects
5 to hide the results that didn't go their way.

6 I think they took a variety of steps to see

7 to it they hid the truth as best as possible. Whether
8 they have managed to do that perfectly successfully or
9 not is a whole 'nother matter. But the documents make
10 it quite clear that is what the goal of the
11 arrangement was.

12 Q Let's see the next one.

13 Another CTR funded project in which the
14 researcher concluded that smoking was likely --

15 By the way, this is 1981, 1983. Do you see
16 that, sir?

17 A I do.

18 Q Smoking was likely responsible for the
19 depression of HDL, the good cholesterol level of
20 smokers.

21 Do you see that?

22 A Yes.

23 Q That is not a very good finding for the
24 tobacco industry, is it?

25 A Again, you have to ask the scientists what's

03781

1 a good -- that sentence on its face does not look like
2 a very good result.

3 Q I know you are not a scientist, but you have
4 generally heard about this thing called HDL, which is
5 good cholesterol.

6 A I have heard about cholesterol. I will tell
7 you that good cholesterol, bad cholesterol, good fats,
8 bad fats, I am not a person to judge -- I have heard
9 the debate.

10 Q Doctor, have you at least heard -- we try to
11 have good cholesterol high, don't we?

12 A I guess, yeah.

13 Q You have never heard that?

14 A At that level that's what I know. You want
15 to have good cholesterol high and bad cholesterol low.

16 Q Apparently smoking doesn't do any good
17 because it reduces the good cholesterol?

18 A According to the finding and that sentence
19 that seems to be the case.

20 Q Let's look at one more.

21 I will now show you what is marked as Defense
22 Demonstrative Exhibit 5212 in evidence, same thing,
23 more findings published by CTR grantees over the
24 years. Let's look at this first one at the top, see
25 if you can understand what this is saying.

03782

1 It says, use of cigarettes, cigars, a pipe or
2 a combination of these increases the -- you understand
3 the word increases?

4 A Yes, that one I understand.

5 Q The prevalence of, then it has a long word,
6 leukoplakia lesions, which I assume you don't know
7 what that is?

8 A You're right.

9 Q But which are related to oral cancer?

10 A Yes.

11 Q So the fact that cigarettes are related to
12 oral cancer, that is not a helpful finding to the
13 tobacco industry, is it?

14 A No, that would not be.

15 Q How about the next one?

16 The next one, done in 1988 as a scientific
17 study funded by CTR called Collective Stimulation of

18 Limbic Dopamine Activity by Nicotine.
19 Do you see that?
20 A Yeah.
21 Q Do you see what it says?
22 A I see what it says.
23 Q Nicotine consumption is connected with
24 neurological activity.
25 You understand what neurological activity is?

03783

1 A Vaguely, yes.
2 Q Do you understand it is connected to the
3 brain activity?
4 A Something to do with your brain, your nerves,
5 yes.
6 Q Nicotine consumption is connected to
7 neurological activity associated with addiction.
8 Do you see that?
9 A Yes.
10 Q And it goes on to give these medical terms
11 thereafter?
12 A Yes.
13 Q Which I assume you probably don't understand
14 those medical terms?
15 A That is a pretty good guess. Regionally
16 selected DA mesolimbic dopamine synthesis.
17 Q Let's see if you understand the first part.
18 Nicotine consumption is connected to brain
19 activity associated with addiction.
20 A Yes.
21 Q That's not a very good finding for the
22 tobacco industry, is it?
23 A Again, it is one sentence connected with, as
24 opposed to causing -- I don't know what the results of
25 that paper are on the basis of that one sentence.

03784

1 That one sentence doesn't sound very good, I will
2 grant you that.
3 Q Are you surprised that CTR's funding that
4 kind of research?
5 A As I said, I think the CTR was trying to
6 limit -- was trying to prevent people from finding out
7 as much as they could have about the health
8 consequences of smoking. I don't think they
9 necessarily did a perfect job of it. But the
10 documents make quite clear that they wanted to not --
11 they did not want to be doing -- they did not want to
12 be focusing on the link between smoking and cancer or
13 smoking and disease. I have repeated myself four or
14 five times now. No, it doesn't surprise me.
15 That sentence doesn't sound very good,
16 although I really can't tell you for certain on the
17 basis of that one sentence what that particular doctor
18 found. I am not suggesting that CTR didn't ever do
19 any real science or any good science, but that the
20 documents are quite clear about what the purpose of
21 CTR was.
22 Q Okay. You understand what I am showing you,
23 these are not secret documents, these are published in
24 scientific journals? You understand that?
25 A I will take your word for that, yes.

03785

1 Q So that they are there -- if CTR is being
2 used as a front and a sham for the tobacco industry,

3 it is not working very well, is it?

4 A You have picked out some. We would have to
5 look at the whole range of research that they were
6 doing and try to judge whether these fifteen or twenty
7 or however many there are or however many there are in
8 total, what proportion of those were compared to the
9 total.

10 And again, you would need a doctor, or
11 somebody in the public health community could give you
12 a better assessment of how much valuable research was
13 being done on the link between smoking and disease and
14 how much research that was just focused on disease was
15 being done.

16 As I say, the documents make it quite clear
17 that the industry viewed the purpose of CTR and TIRC
18 to be an industry shield. The documents make it quite
19 clear that the industry eventually came to the
20 conclusion that because TIRC and CTR had denied,
21 denied, denied for so long that there was any link
22 between smoking and cancer, that eventually it lost
23 its credibility. The documents make it quite clear
24 that CTR was used by, for example, Philip Morris to
25 communicate to U.S. Tobacco to stop doing health

03786

1 advertising.

2 Yes, it appears that they have done some
3 science. Some of that science may well have not been
4 in their best interests. I am not really the person
5 to evaluate any one specific piece of that or to be
6 able to weigh the lump sum total of that research and
7 all the research they were doing. But the documents
8 make it quite clear what the goal and how -- what the
9 goal of CTR was and how they went about doing things.

10 Q You understand we are not talking now about
11 some goal or some abstract goal, we are talking about
12 -- this shows you what CTR actually did, do you
13 understand that, Doctor?

14 A That shows a small piece of what CTR actually
15 did.

16 Q If they didn't do any more than this, if they
17 did no more than this -- strike the question. I
18 strike the question.

19 Let's look at the next one. The next one.
20 Maternal. You understand that refers to a mother?

21 A Yes.

22 Q Tobacco smoking during pregnancy excerpts, a
23 retarding influence on fetal growth.

24 Do you understand what that is saying?

25 A Yes.

03787

1 Q Manifested by decreased birth weight and
2 dimensions of the infant.

3 Do you see that?

4 A Yes.

5 Q Clearly connecting smoking to reduced birth
6 weight?

7 A Yes.

8 Q That is not a very good finding for the
9 tobacco industry, is it, sir?

10 A If that is the final conclusion of the paper,
11 that does not sound like a very good conclusion for
12 the tobacco industry.

13 Q How about the next one?

14 Women smokers show a higher level of
15 thromboxane, which I'm not sure what that is.
16 Do you know what that is?
17 A No.
18 Q A(2), but it is an important clotting factor
19 that plays a role in heart disease.
20 Do you see that?
21 A I do.
22 Q Would you agree that doesn't sound very good
23 for the tobacco industry?
24 A No, that sentence by itself does not sound
25 very good for the tobacco industry.

03788

1 Q Now, as far as the totality of the work done
2 by CTR -- let me show you, first of all, the people
3 who were the scientific directors of this organization
4 over the years.
5 MR. FERGUSON: What is the number on this?
6 MR. WEBB: Demonstrative Exhibit 5209.
7 BY MR. WEBB:
8 Q The first director was Dr. Clarence Cook
9 Little, 1954 to 1971. Do you see that, sir?
10 A Yes.
11 Q Did you make any effort to learn about his
12 background before you concluded that CTR was a front
13 or sham?
14 A No.
15 Q It says here that his background was, he was
16 president University of Michigan, president of the
17 University of Maine, founder. Jackson Memorial
18 Laboratory. Managing director of the American Society
19 for Control of Cancer, which is now the American
20 Cancer Society.
21 Do you see that?
22 A Yes.
23 Q And he was the president of the American
24 Association for Cancer Research. Do you see that?
25 A Yes.

03789

1 Q Does that look like the background of a
2 reputable person from the scientific community to head
3 up this organization?
4 A It looks like the background of a reputable
5 scientist.
6 Q Let's look at the next one, Dr. Gardner, he
7 was the next scientific director of CTR. It says here
8 that he served for nine years. He was professor and
9 chairman of anatomy at the department, Yale Medical
10 School.
11 Do you see that, sir?
12 A Yes.
13 Q President of the International Union against
14 cancer. President of the American Association of
15 Cancer Research. Member of the National Cancer
16 Institute.
17 Do you see that?
18 A Yes.
19 Q That is a government agency?
20 A Yes.
21 Q Over two hundred scientific publications. Do
22 you see that?
23 A Yes.
24 Q Does Dr. Gardner appear to be someone who has

25 a strong background in the scientific community based
03790

1 on what you've just seen there?

2 A Yes.

3 Q The next director of CTR, Dr. Sheldon
4 Sommers, for six years from 1981 to 1987. It says
5 here he was the head of pathology at Lenox Hill
6 Hospital in New York. Faculty member at Columbia and
7 Harvard Medical Schools. President New York
8 Pathological Society. Over three hundred scientific
9 publications.

10 Do you see that?

11 A Yes.

12 Q Does he appear to have a reputable background
13 in the scientific community?

14 A Sure.

15 Q The last director was Dr. James F. Glenn,
16 1988 to 1990. President, Mount Sinai Medical Center,
17 New York. Dean, Emory Medical School, chief of
18 Urology, Duke Medical School. Executive director of
19 the Markey Cancer Center. And over 250 scientific
20 publications.

21 Does he appear to be a person with a strong
22 background in the scientific community?

23 A Sure.

24 Q Have you looked at the backgrounds of the men
25 and women who served on the scientific advisory board

03791

1 that had the responsibility of reviewing these
2 applications for research?

3 A No.

4 Q You didn't review their backgrounds before
5 you reached your conclusions about the collusion?

6 A No.

7 Q I will show you a couple of listings here.
8 This is demonstrative Exhibit 5199. These are members
9 from 1954 to 1997. Let me back up so we can at least
10 try to get this on here a little bit.

11 Can you read some of those --

12 A Yeah.

13 Q -- on your screen there so can you see the
14 type of people that served on the scientific advisory
15 board?

16 A Yes.

17 Q Do those at least appear to be reputable
18 institutions?

19 A Sure.

20 Q Go ahead and look. Is it easier to see on
21 your screen?

22 A It is equally bad there and there.

23 Q I have an extra copy.

24 A The one that I don't think is necessarily a
25 reputable institution is the one that is down about

03792

1 midway, McCallister Council for Tobacco Research.
2 Aside from that, the rest of them appear to be
3 reputable institutions.

4 Q But that one --

5 A The rest of them, I'll not quibble with any
6 one of those hospitals, medical centers, universities.

7 Q I checked off -- some of those are
8 outstanding universities, are they not?

9 A Yes.

10 Q And from -- like the National Cancer
11 Institute, the Fox Chase Cancer Center, the Kimmel
12 Cancer Center at Jefferson Hospital, as far as you
13 know?

14 A Again, since I am not a cancer researcher, I
15 have never heard of the Kimmel Cancer Institute at
16 Jefferson Hospital. I have certainly heard of Harvard
17 University, University of Wisconsin. I am not
18 quibbling with you. I will take your word for it.
19 You have established that is an important cancer
20 institute. I don't know. I can tell you what the
21 best economics departments are in the country, I can't
22 tell you what the best cancer research --

23 Q You know what The Cancer Institute is?

24 A Sure.

25 Q I have tried to check off, the one from this
03793

1 list, Mr. Coates, from The Cancer Institute, so is Dr.
2 Andrew Bolt, so is Dr. Huebner.

3 Do you see that, sir?

4 A Yes.

5 Q So you are not doubting that the men and
6 women who served on the scientific advisory board to
7 make decisions about what research to be done appear
8 to be reputable scientists, do they not?

9 A They do.

10 Q Now, if we look at the totality of research
11 done by CTR, let me show you -- I will ask you if you
12 became aware of this information before you reached
13 your opinions in this case, sir. I am reading from
14 demonstrative -- defense demonstrative Exhibit 5203.

15 Did you understand prior to rendering your
16 opinion about the collusive nature of CTR that it
17 provided over 284 million dollars to fund research
18 during the time period 1954 to 1997? Did you know
19 that?

20 A I'm not sure I knew that precise number. Let
21 me think about that one for a second.

22 Q Did you know before you reached your opinions
23 in this case about the collusive nature of CTR --

24 A That's about 3 million dollars a year, is
25 that what that boils down to? I am just trying to --
03794

1 go ahead. I didn't know that precise number, no.

2 Q Did you know that from 1954 to 1997 that CTR
3 funded 1,395 scientific research projects?

4 A No, I probably didn't know that precise
5 number, no.

6 Q You didn't know how big it was?

7 A I knew they funded a lot of science. I don't
8 deny that. The precise number, 1,395 -- as I say, the
9 question is, is that the sort of science that links --
10 of those 1,395 research projects which of them are
11 aimed at researching the disease, which is potentially
12 valuable science in and of itself, but doesn't do what
13 the industry said they were going to do in their Frank
14 Statement, which is find out the truth and the link
15 between smoking and cancer. I believe they had a lot
16 of grants. 1,395 over that time period, I suppose we
17 could go on to put that in some sort of comparison
18 with how many scientific research projects the
19 National Cancer Institute did or Sloan-Kettering did.
20 But that's a sizable number.

21 Q Do you think it was a bad thing that the
22 tobacco industry was -- strike the question.
23 They funded research by 1,190 independent
24 scientists at over three hundred research
25 institutions.

03795

1 Do you see that?

2 A Yes.

3 Q I take it you have no reason to believe these
4 independent scientists were some part of some
5 collusive sham, do you?

6 A Not personally. I think those scientists
7 were interested in researching cancer. Most of them
8 were interested in researching cancer, which is a
9 valuable thing to research. But the stated -- the
10 publicly stated purpose of the CTR was to research the
11 link between smoking and cancer.

12 Q Are you faulting the tobacco industry because
13 it chose to fund 1,190 independent scientists?

14 A Not in and of itself, no.

15 Q The fact that three of the grantees later won
16 noble prizes, do you fault the tobacco companies for
17 that?

18 A I don't give them credit for it, either,
19 but, no, I don't.

20 Q The fact that there is over 6300
21 scientific publications that now exist because of
22 tobacco money, do you fault them for that?

23 A Not necessarily, no.

24 Q Did you look and see how often the surgeon
25 general of the United States has actually cited those

03796

1 reports?

2 A No. I have had it represented to me, but I
3 didn't look into it myself.

4 Q Before you reached your opinions that this
5 was a sham organization, did you learn that if we look
6 at the surgeon general reports and the number of times
7 that they have actually referred to CTR funded
8 research, that you would find over five hundred
9 citations to CTR research? Did you know that?

10 A I think I had heard something along those
11 lines, sure.

12 Q Now, you understand that the surgeon general
13 -- that's the office that has been rendering these
14 reports over the years that connects smoking to
15 disease, is that correct?

16 A Yes.

17 Q So the public health officer who is
18 connecting smoking to disease found it worthwhile to
19 at least cite CTR research more than five hundred
20 times?

21 A Apparently.

22 Q Do you think if you had known that, that
23 might have helped you reach a different conclusion
24 that CTR was just a collusive sham organization?

25 A No. I knew that and I still have that

03797

1 opinion of the CTR. As I said, the CTR funded a lot
2 of research --

3 MR. WEBB: I have no question pending, your
4 Honor.

5 THE WITNESS: I am completing my previous

6 answer.
7 THE COURT: There is no question pending.
8 You can explore that on redirect.
9 BY MR. WEBB:
10 Q I will move to the third agreement now,
11 Doctor. The third agreement, the third collusive
12 agreement that you wrote on this chart is the what you
13 called the arrangement -- I take it you mean the
14 collusive arrangement, is that correct?
15 A Yes.
16 Q -- to refrain from in-house testing of live
17 animals?
18 A Yes. I emphasized just for the purposes of
19 keeping it short, I didn't say relating to smoking and
20 health, relating to the issue of smoking and health.
21 But that's what I mean.
22 MR. FERGUSON: Mr. Webb, can you move one of
23 those?
24 MR. WEBB: I will get this completely out of
25 the way. And I will move this around to make it

03798

1 easier for you.
2 BY MR. WEBB:
3 Q Now, directing your attention to this third
4 arrangement. I want -- I want to make sure I
5 understand your testimony correctly and then I will go
6 on and ask you some questions about it.
7 It is your testimony that from an economist
8 standpoint if the tobacco companies entered into an
9 agreement not to do biological research, you believe
10 that would be anti-competitive because such an
11 agreement might slow down the development of safer
12 cigarette products, is that correct?
13 A I'm not sure I would make it quite as broad
14 as you just made it, my statement, no. I think you
15 broadened -- you broadened my statement considerably,
16 my testimony considerably.
17 Q That is not your testimony -- you are not
18 suggesting that it slowed down the development of
19 safer cigarettes?
20 A No. That is the nature of the agreement that
21 I think you are mischaracterizing.
22 Q Okay. Let's find out. The agreement is an
23 agreement not to do in-house biological research?
24 A In-house biological testing of live animals
25 for the purpose of determining -- for evaluating

03799

1 smoking and health. I will live with that phrase for
2 the moment.
3 Q So, if you will, to make it a little easier
4 for the jury and me, if I use the term biological
5 research, I promise you I am referring to it in the
6 way you just said.
7 A That is an important distinction, because the
8 industry does a lot of research on biology, for
9 example, research on -- research on tobacco plants is
10 research on biology at some level. Tobacco plants are
11 part of biology. So I want to be very specific what
12 we are talking about is the testing -- the sort of
13 testing on animals -- live animals the way Dr. Wynder
14 was doing it and so forth.
15 Q Let's put it --
16 A The inhalation tests, skin painting tests and

17 so forth.
18 Q Let's put it in terms the jury can
19 understand.
20 When you say biological research, when we cut
21 through it, what we are talking about, in connection
22 with smoking and health anyway, you are talking
23 primarily about animal skin painting testing for one,
24 is that correct?

25 A That would be one.

03800

1 Q Number two, are animal inhalation studies,
2 smoke inhalation studies, that would be another?

3 A That would be another, yes.

4 Q Is there anything else you would include in
5 there?

6 A That is my familiarity with it. There might
7 well be others, but not being the sort of person who
8 does that sort of research, I couldn't tell you the
9 name of every kind of animal testing that gets done.

10 Q At least --

11 A That's the kind of research I have in mind.

12 Q When we refer to biological research, we will
13 understand that you are primarily referring to animal
14 inhalation studies and animal skin painting, is that
15 fair?

16 A And things like that. The sorts of tests
17 that you would need to do in order to establish
18 whether a product was safer or not.

19 Q That's fine. Is it my understanding that you
20 believe that there is an agreement not to do that type
21 of biological research -- that type of research you
22 just described?

23 A Yes. I think there was an agreement not to
24 do that type of research.

25 Q I understand that. The problem with that

03801

1 agreement, according to your testimony is, you believe
2 that would have an anti-competitive effect of slowing
3 down the development of safer cigarette products?

4 A I think that helped. I think that was part
5 and parcel of this bigger collusive scheme -- it was
6 part of that bigger collusive scheme to resist
7 competing on the basis of safety or health, yes.

8 Q Well, this actually was a separate
9 arrangement, was it not?

10 A I think all four of these strands are all
11 part of a larger -- of a large conspiracy or cartel
12 agreement not to compete on the basis of health.
13 There is specific language about that particular one,
14 that one gets mentioned by name, by people in the
15 industry as the gentlemen's agreement, as one of the
16 two gentlemen's agreements.

17 But I think to separate it out and say this
18 is a collusive arrangement, and number one is a
19 collusive arrangement, and number two -- to think of
20 them as four separate collusive arrangements is
21 probably to misinterpret my views on this. They are
22 all part and parcel of one grander scheme to suppress
23 competition on the basis of safety in cigarettes.

24 Q You understand I am not trying to
25 misinterpret -- you understand I am reading from your

03802

1 chart, you understand that?

2 A Yes, I understand you are reading from my
3 chart, yeah.
4 Q And on this third arrangement that you have
5 put number 3 next to?
6 A Yes.
7 Q You told the jury what you thought the harm
8 was, if you had this type of agreement there is no way
9 to test potential safer cigarette products with
10 animals?
11 A If people stick to the agreement, that's
12 right.
13 Q Now, my question to you is -- strike the
14 question. Would you please tell me -- strike the
15 question.
16 You put a date next to the first two
17 agreements, 1953, Plaza Hotel?
18 A Yes.
19 Q Can you just tell me so I know what date or
20 what year do you pinpoint Philip Morris entering into
21 this arrangement?
22 A I can't pinpoint it to the year, because I
23 haven't seen a document that says when the arrangement
24 started.
25 Q Can you get a decade?

03803

1 A Again, I can't tell you when it started. I
2 can tell you it was by 19 -- I will have to think
3 about the document. I will have to think about when
4 it was that Helmut Wakeham, who was the head scientist
5 at Philip Morris, said there was such an agreement. I
6 think it was in the 1960s. Certainly by the 1960s --
7 it will come to me which particular year it was.
8 Q If this helps you, Doctor, I will represent
9 to you on August 31, in your deposition, you said you
10 believed it took place around 1963 or 1964.

11 Does that help you?

12 A I'm going to have to think carefully and try
13 to remember the date of the document that I am trying
14 to cite.

15 As I sit here at the moment -- maybe it will
16 come to me. But as I sit here at the moment I think
17 that is when I would date it.

18 Q I just want to make sure. Is it your best
19 recollection that you pinpoint the date that this
20 agreement took place around 1963 or 1964?

21 A No. Let me be very specific. I don't know
22 when this gentlemen's agreement started. I know by --
23 at some point, and I am just trying to remember the
24 date of the document. But at some point Dr. Wakeham
25 refers to the gentlemen's agreement. And so I know

03804

1 that by that time -- by that time I believe the
2 agreement had been entered into. But I can't -- I
3 don't know when precisely it started.

4 Q Let me summarize, and I think I have it now.
5 You don't know exactly when Philip Morris entered into
6 it, but by 1963 or 1964 Philip Morris was in the
7 agreement? Did I say that correctly?

8 A The only thing is, I am trying to recall the
9 date of the document. And I will try to refresh my
10 memory. But there is certainly a date at which Helmut
11 Wakeham talks about the gentlemen's agreement. At
12 this point he wants to -- he is concerned that it is

13 breaking down and he wants to start cheating on it
14 himself.
15 Certainly by the date of that document, and I
16 will just have to refresh my memory as to the
17 particular date, certainly by that point I believe
18 that Philip Morris is involved in this agreement.
19 THE COURT: We will see you at 1:30.
20 (Luncheon recess.)

03805

1 (Afternoon session.)
2 (Jury not present.)
3 MR. FERGUSON: I need just a moment for a
4 situation that may develop with Dr. Solow. We were
5 hoping it wouldn't, but it looks now like it might.
6 Dr. Solow informs me he absolutely has to be back in
7 Iowa this Wednesday, so he needs to leave tomorrow.
8 That means if we are not concluded, either defendants
9 don't conclude their cross or we haven't concluded
10 redirect, we are going to have to ask the Court to let
11 him go and bring him back at some later time to
12 conclude.
13 We have kept him here, going on two and a
14 half weeks, he has classroom responsibilities we have
15 to get him back to.
16 THE COURT: Just so I am not jumping back and
17 forth, what is your estimate at this point about
18 redirect?
19 MR. FERGUSON: Thirty minutes.
20 THE COURT: Okay.
21 And what is the defense collective estimate
22 about further cross?
23 MR. WEBB: Your Honor, I think my cross may
24 be done in an hour to an hour-and-a-half,
25 approximately. I will just try and do the best I can.

03806

1 I have cut a lot of material out. Understanding what
2 the rest of the defense is, generally, it looks to me
3 like we would finish cross-examination by the end of
4 today, maybe an hour into tomorrow, to give you a
5 rough approximation.
6 So with a thirty minute redirect, it looks to
7 me like we will be done.
8 MR. FERGUSON: I hope that's the case. I
9 just wanted the Court to be aware that that
10 possibility exists.
11 MR. WEBB: I will say for some we are not
12 done, I have caucused with my co-counsel here, we have
13 very strong objections to allowing this witness to
14 just leave in the middle of his examination and not
15 complete his examination. I hate to argue that at
16 this point and take up your Honor's time. I guess
17 prudence dictates I hold that argument, unless you
18 want to hear about this now.
19 MR. FERGUSON: I think this may occur with
20 other witnesses. I don't expect this to be a unique
21 situation with Dr. Solow. We do ask for the
22 defendants' understanding. We would be happy to
23 extend that to them should this develop with their
24 witnesses.

25 MR. WEBB: I told the plaintiff earlier, when
03807
1 we interrupted for Mr. LeBow, we will accommodate them
2 to do that. But that is a lot different -- I mean --

3 to accommodate a witness for half a day in that case
4 to do another witness versus -- I mean -- are you
5 talking about bringing him back a day or two later?

6 MR. FERGUSON: We would have to certainly
7 check with Dr. Solow's availability. He anticipated
8 going on a week ago last Monday. As a result, as I
9 say, he has been here for two and a half weeks.

10 Your Honor, if we don't have a lot of
11 repetitive questioning this afternoon, and tomorrow
12 morning, perhaps we can make it. I am hopeful that we
13 will. But I think we have some obligation to
14 accommodate Dr. Solow's schedule. He has been here a
15 long time and he does have responsibilities at the
16 university.

17 THE COURT: Anything further?

18 MR. FERGUSON: No, sir.

19 THE COURT: It seems to me that we've got to
20 deal with this issue a witness at a time. And what
21 may be appropriate in Dr. Solow's case may or may not
22 be appropriate as we face other witnesses. There may
23 be accommodations that the parties feel are possible
24 for certain witnesses and don't feel are possible, at
25 least in terms of an advocacy position, for other

03808

1 witnesses. So I'm not requiring either side to look
2 at the big picture quite yet.

3 I will say at this point Dr. Solow, according
4 to my numbers, has testified on plaintiff's side of
5 the case, let's see, 290, 270, 35 and 5. Actually
6 some of those -- the caveat I guess on both sides -- I
7 see Mr. Berman looking puzzled, where does the 5 come
8 from. I think you must have opened your mouths and
9 said something that led me to give you five minutes.

10 This is the days that he has been on the
11 stand on each side, so that I guess you would have to
12 discount on each side by a small number of minutes.
13 But the days that he has been on the stand are, as I
14 indicated, for plaintiff.

15 For defendants it is 520 last week, and then
16 we have this morning, and are facing significantly
17 more examination. It seems to me that the possibility
18 exists, and I want to see what the parties' positions
19 are as it relates to -- as those positions relate to
20 this witness, notwithstanding the overall long
21 allocations of time to each side, but to look at
22 suballocations for particular witnesses, as long as
23 those are quite generous.

24 In this case I can see that based on the
25 defendants' penciling in of the time expected and

03809

1 adding to that some significant length of time, that
2 we can come to a result that allows plaintiff to have
3 the redirect outline, plus a little bit more just for
4 cushion. And the defendants have plenty of
5 cross-examination, and for me to define that in a way
6 that doesn't punish either party, that gets Dr. Solow
7 out of here, as he anticipates needing to be out of
8 here, tomorrow.

9 When is the last time he could leave
10 consistent with his plans? Maybe can I ask him
11 directly.

12 MR. FERGUSON: I think it is better to ask
13 him directly.

14 THE COURT: When do you need to be out of
15 here to catch a flight?

16 THE WITNESS: I haven't looked at the flights
17 yet. I am prepared to spend the night in Chicago or
18 Denver to get back tomorrow morning. I had somebody
19 cover for me once, I have already had to move once.
20 If I have to move again next Wednesday I will have
21 serious problems.

22 THE COURT: So we have all tomorrow. I am
23 not saying I hope that. So it does seem to me --
24 let's not universalize it, if we can avoid it. I can
25 direct that the defendants cross would be concluded by

03810

1 tomorrow morning. That is more than enough time for
2 what you have in mind. I'm not saying I am going to
3 do that on every witness, but that gives you the
4 afternoon to redirect. I am not trying to force
5 anybody into a box, but it just does seem to me that
6 it is more than adequate. If you know that you are in
7 that situation, I think you will plan accordingly.

8 MR. WEBB: I don't think there is any reason
9 to object to that. I don't want to sound defensive.
10 We have been faced with a witness that has testified
11 on direct in an extraordinarily broad way. We have
12 tried not to duplicate and take up time unnecessarily.
13 I am actually trying to cut back. But your Honor's
14 suggestion seems reasonable to me. I haven't caucused
15 with my co-counsel, but based on what I understand
16 their plans of cross-examination to be, we should be
17 able to live within your Honor's suggestion.

18 MR. FERGUSON: Likewise, your Honor, I think
19 that is good from our perspective. I didn't intend to
20 -- if I was critical of defendants, I apologize for
21 that. I simply wanted to call attention to Dr.
22 Solow's problems.

23 THE COURT: I hope everyone understands I was
24 not being critical either. I believe he is an
25 important witness and is taking a lot of time,

03811

1 understandably. But it will be the Court's direction
2 that the defense cross conclude by noon tomorrow at
3 latest, with the afternoon set aside for redirect and
4 recross if necessary. And I guess I will have to --
5 in fairness to everyone I will have to look at the
6 issue, which I really don't anticipate, allocating
7 tomorrow afternoon even-handedly if we get to that, so
8 he is on his plane no later than tomorrow evening.

9 Anything else we should talk about?

10 MR. LUVERA: Yes, your Honor. Mr. Berman and
11 I have been debating which one of us gets to tie the
12 bell around the cat's neck, and he lost. We have a
13 problem with our next witness that we would like to
14 bring up.

15 THE COURT: Are you going to alternate
16 sentences here?

17 MR. BERMAN: I am the designated trouble
18 maker, I guess, on this witness, your Honor.

19 Again, I want to preface this, we are not
20 suggesting any fault on behalf of the defendants in
21 scheduling. They can use the clock any way they see
22 fit. But in all honesty, we never anticipated
23 Professor Solow would go as long as he did. A fact
24 which he reminds me of daily. But -- so now we have

25 our next witness, who is Professor Donaldson. And
03812

1 Professor Donaldson believed that he would begin his
2 testimony, originally when we noted him for this week,
3 sometime on Monday. That was a week ago or so because
4 of how we scheduled things. I told him that late last
5 week that I thought he might go on beginning Tuesday
6 morning. And now that is slipping.

7 Professor Donaldson has to be -- Professor
8 Donaldson teaches at Wharton. The only open two days
9 in a row that he has until the end of November is this
10 week. But this Thursday -- so we have two and
11 Wednesday he would be done. But this Thursday he does
12 not have an open day.

13 One of the problems we have in putting on
14 this case, we don't have any employees so we have to
15 rely on experts. All of our experts are highly
16 credentialed and highly busy. So Professor Donaldson
17 would have to miss a major speech he is planning on
18 giving Thursday, which he really, really cannot do.
19 He is the guy giving the speech. After that he only
20 is available on single days. He teaches at Wharton
21 Mondays and Wednesdays. So he is available to finish
22 if we interrupted his testimony on a Tuesday or a
23 Thursday. And is he willing to do either.

24 So I am raising this because I want the Court
25 to know at the beginning that it now looks like we
03813

1 won't call Professor Donaldson until tomorrow
2 afternoon, if we are lucky. And that we would
3 probably go all of Tuesday and Wednesday on direct.
4 And then he would have to leave. And we would bring
5 him back as soon as we could get the next free day for
6 cross.

7 So I raise -- what we were planning on doing
8 Thursday, then, is playing Mr. Osdene's deposition,
9 which I know the Court has worked hard on and we will
10 finally get to.

11 THE COURT: How many -- this is a side issue,
12 but what does your edit of Dr. Osdene amount to, more
13 or less?

14 MR. BERMAN: I have someone doing it right
15 now, and I haven't got to tell yet because they are
16 still playing around with the tape.

17 THE COURT: And how many hours would you
18 expect to be on Professor Donaldson's direct?

19 MR. LUVERA: Let me respond to that, your
20 Honor.

21 I believe, based upon the document review
22 that I have done, that if in fact we are going to take
23 the morning up with Dr. Solow, as if we are, then I am
24 going to take the remaining Tuesday, Wednesday up on
25 direct. That is a day and a half.

03814

1 MR. BERMAN: I suspect, based on what I know
2 is an outline, that they are going to have substantial
3 cross-examination.

4 MR. McCORMICK: Your Honor, I completely
5 understand scheduling issues. We will face them, too.
6 But this is not really a fair, livable situation. Dr.
7 Donaldson has to give a speech? Dr. Donaldson has a
8 conflict with us, he is supposed to be an important
9 witness in a 2 billion dollar lawsuit. The speech

10 takes precedence? I don't understand that. For them
11 to be able to put on his direct examination -- and I
12 would, when the jury is not waiting for us, perhaps at
13 the end of the day, have an opportunity to address the
14 evidentiary issues which we raised which I think will
15 flush some more of this out.

16 To have them put on Dr. Donaldson and then
17 have Dr. Donaldson leave for some indeterminate period
18 of time before we've get our chance to cross-examine
19 him in front of this jury is really just not fair. If
20 he wants to participate in this lawsuit he has to make
21 the time to participate in this lawsuit. If they
22 can't accommodate us to do at least some reasonable
23 direct examination, then they ought to put somebody
24 else on who we can get done and who is willing to make
25 himself available. But the idea they are going to

03815

1 have him for a day and a half of direct examination,
2 he is going to disappear off for some indeterminate
3 period of time, we don't think that is a fair way to
4 proceed and they ought to get somebody else in here to
5 testify if they can't -- if Dr. Donaldson can't
6 accommodate them.

7 MR. BERMAN: There is a number of responses
8 to that, your Honor. Again, Dr. Donaldson -- we
9 wouldn't have slotted him in if we thought this was
10 going to happen with Professor Solow. Dr. Donaldson's
11 appearance in Washington D.C. at this speech he was
12 giving was something he scheduled over a year ago.
13 And we wouldn't even have dreamed of it if we thought
14 this was going to be a possibility.

15 Again, I am not casting aspersions on how
16 they conduct their exam, but we didn't anticipate they
17 would use more time than we took with Dr. Solow. That
18 is kind of unusual. That is number one.

19 Number two, if we do finish direct and they
20 don't have a chance to cross -- actually, they are
21 advantaged, because rather than having to work on the
22 cross at night they will have weeks to prepare a
23 cross-examination outline for whenever he comes back.
24 That is a situation I would love, if I were on the
25 other side, rather than scrambling at night to get

03816

1 ready. So I don't think they are seriously going to
2 be prejudiced here.

3 I think that one thing we ought to consider,
4 that Dr. Donaldson might be willing to consider -- of
5 course the Court can order him to do whatever the
6 Court wants, but he did say I have done the speech a
7 year in advance. I could cause a lot of problems and
8 try to get someone to substitute. But the question
9 you asked me, would that be the end, if you closed on
10 direct on Wednesday and they began cross on Thursday,
11 would I be done? And I said I doubt that you would be
12 done, which means no matter what happens his testimony
13 is going to be interrupted and he is going to have to
14 come back here.

15 So it is not like he is not going to be
16 interrupted and come back. The following Monday we
17 weren't planning on calling Dr. Donaldson, we were
18 planning to start with our next witness, who was also
19 scheduled. So we have got all these problems. And
20 that's the situation.

21 MR. LUVERA: Might I make a small point?

22 THE COURT: Yes.

23 MR. LUVERA: In a normal trial we wouldn't
24 have this trouble. We could substitute witnesses.
25 Given the pre-designation arrangement we have it is

03817

1 really hard for us to substitute the way we would in a
2 normal case, because they are entitled to know what
3 exhibits, et cetera. And I note -- there was a
4 cartoon once showing two Roman gladiators who were
5 pouring boiling oil on them, you knew about the
6 boiling oil when you joined up. I knew about the
7 rules beforehand, but I just wanted to say if it
8 weren't for that, we could substitute and it would not
9 be a problem.

10 THE COURT: The trial is difficult for
11 everyone involved. I appreciate that. I don't want
12 to seem unsympathetic, but I have never allowed the
13 interruption of a witness's testimony absent
14 agreement. And I don't think it is fair over
15 objection to have a witness testify to all or part of
16 the direct and then to return at some significant time
17 later to complete testimony.

18 Certainly I have allowed interruption of
19 testimony by the Court's direction or agreement for a
20 brief period of time to accommodate another witness
21 testifying. In fact, we have done that in this case.
22 I am willing to do one of two things. I will listen
23 to you before I do the one that I am going to mention.
24 I have in the past, and am willing to consider in this
25 case, an even-handed allocation of a reasonable amount

03818

1 of time for the examination of a particular witness.
2 In other words, the plaintiff could commit to a
3 particular length of time for Professor Donaldson's
4 examination consistent with his schedule. The
5 examination then would be directed to fit within that
6 time. It would be a subset of the overall allocation
7 of time.

8 Now, obviously he is not an hour witness,
9 half hour for plaintiff, half hour for defendant. And
10 I would listen to defendants about their perceived
11 needs for Professor Donaldson before allocating. But
12 it is possible to have that kind of an even-handed
13 allocation of the time available this week. It
14 doesn't appear to be realistic that that time could
15 conclude on Wednesday, but it could conclude from what
16 I am understanding of the parties' needs on Thursday,
17 if I got and enforced a particular time deadline.
18 Absent that kind of imposed time limit, I'm afraid
19 Professor Donaldson and other witnesses will need to
20 stay available once they begin their testimony.

21 Certainly in his case if there was testimony
22 on Thursday and he needed to return on Monday, which
23 appears to be an open day on his teaching schedule,
24 that is a possibility. And we also may want to see
25 before finalizing that exactly when we conclude with

03819

1 Professor Solow tomorrow. But let me at least
2 understand the parties' tentative positions about that
3 kind of allocation.

4 MR. LUVERA: If we could just have a moment
5 to talk. My big concern, and I certainly wouldn't

6 attribute any bad motives to the other side, but if
7 the cross-examination of Dr. Solow should continue for
8 quite awhile longer than anticipated, that would
9 reduce the available time for this rather important
10 witness. And that would be my concern. But can I
11 just speak to --

12 THE COURT: Sure. I guess I have already
13 addressed that to some extent by the noon tomorrow
14 deadline.

15 MR. WEBB: Can I possibly make a suggestion?

16 THE COURT: Yes.

17 MR. WEBB: We will get Dr. Solow done
18 pursuant to your Honor's scheduling, but could we
19 caucus and deal with the Dr. Donaldson situation at
20 4:00 and go ahead and start with Dr. Solow, because we
21 will need to caucus on this issue.

22 THE COURT: That's fine. The plaintiffs may
23 want to think it over. And you may also want to check
24 with Professor Donaldson. Let me tell you another
25 wrinkle here, we have talked about Friday, I don't

03820

1 know how that fits into everyone's schedule this week.
2 And I have to check something because there is a death
3 penalty case that is beginning that Judge Armstrong
4 has beginning. They want to use this courtroom. And
5 I told them they could, not having heard about this
6 situation on Friday. In fact, I admit I suggested it
7 for the mass initial voir dire. That would not
8 necessarily take all day. And if Friday became an
9 important issue for this trial we could try to
10 coordinate -- as of now they are scheduled for the
11 morning, it is possible we could shoehorn that in at
12 another location or have this trial in session on
13 Friday afternoon, if absolutely necessary.

14 So why don't we follow up Mr. Webb's
15 suggestion and you take all the permutations and kind
16 of know where I am on the overall issue and we will
17 get the jury in here and get Professor Solow out of
18 here, we hope.

19 (Jury present.)

20 THE COURT: Good afternoon. Please sit down.

21 MR. WEBB: May I proceed, your Honor?

22 THE COURT: Yes, please.

23 BY MR. WEBB:

24 Q Dr. Solow, when we took our noon luncheon
25 recess I was asking you questions about the third -- I

03821

1 started to ask you questions about this third
2 agreement. And we were talking about that.

3 Do you recall that, sir?

4 A Yes.

5 Q And just so I can have a time frame to ask
6 you questions then, you were going to check to tell me
7 what year, or approximately what year by which you
8 believe Philip Morris had entered into this collusive
9 arrangement that you put as number 3 on this chart.

10 A Still, to the best of my knowledge, is by
11 1963 or '64 they were involved in this arrangement,
12 yes.

13 Q And therefore, as far as my client is
14 concerned, Philip Morris, am I correct that if you
15 believe this, they were part of this agreement by 1963
16 or 1964, I take it you would have actually examined

17 the evidence to see whether or not Philip Morris
18 actually did any live animal research after 1963 or
19 1964?

20 A That's part of it, yes.

21 Q And did you examine the evidence to see
22 whether or not Philip Morris in fact did live animal
23 research after the date you say they had entered into
24 this agreement?

25 A Yes.

03822

1 Q And did you find that Philip Morris in fact
2 had -- did in fact do a substantial amount of mouse
3 skin painting testing as well as smoke inhalation
4 studies after the date you say they joined this
5 agreement?

6 A Yes, I think there was some going on, yes.

7 Q And do you agree, as an economist, that once
8 you saw the evidence that in fact Philip Morris did a
9 substantial amount of live animal testing after the
10 date by which you say they were in this arrangement,
11 did that indicate to you that maybe there was a
12 possibility that they were never in the collusive
13 agreement in the first place?

14 A No, I don't think that follows.

15 Q As an economist, Doctor, do you believe that
16 if a few people agreed to rob a store, and then you
17 found out the store never was robbed, would that
18 indicate to you that maybe there was never an
19 agreement to rob the store in the first place?

20 A I suppose it would depend on what evidence
21 you had about their agreement in the first place. In
22 collusive agreements there is -- as I tried to explain
23 to the jury, there is an incentive to complete on the
24 agreement.

25 Q What you call cheating would just as well be

03823

1 evidence that the agreement never took place in the
2 first place?

3 A If there were no evidence that there was an
4 agreement.

5 Q Did you see evidence that Philip Morris in
6 fact did a substantial amount of live animal testing
7 after 1963 and 1964?

8 A I believe they did some, yes.

9 Q And, again, we are defining live animal
10 testing to include, among other things, mouse skin
11 painting and animal inhalation studies, is that
12 correct, based on your definition?

13 A Yes.

14 Q I am going to hand you a document that is in
15 evidence that is marked as Defense Exhibit WX130. I
16 am also going to put it on the screen for the jury.
17 Whatever is easier for you to follow, but I am going
18 to put this up on the screen now for the jury. I will
19 try to get this focused.

20 Do you see -- did you actually see this
21 document reporting on some Philip Morris animal
22 studies after 1963 and 1964, sir?

23 A No, I don't believe I have ever seen this
24 document before.

25 Q Let's look at what it is. Let's go to the

03824

1 first page of it.

2 Do you have the first page in front of you,
3 sir?
4 A Yes.
5 Q What we see from the first page of this
6 document, that this is project 6900, physiological
7 studies. The time period covered is October 1966 to
8 April 1967. I think that is April 10th.
9 Do you see that?
10 A Yes.
11 Q And the date of the report is May 9th, 1967?
12 A Yes.
13 Q And -- did you learn that Mr. Carpenter is a
14 research scientist at Philip Morris?
15 A Yes.
16 Q And if we look at this -- let's just read
17 part of this so the jury can -- this is after you say
18 Philip Morris had joined in this collusive agreement
19 not to do animal research?
20 A Yes.
21 Q I will back this up just a little.
22 MR. LUVERA: I missed the number.
23 MR. WEBB: I'm sorry. It is number WX130.
24 BY MR. WEBB:
25 Q It says, the objects of this project are to
03825
1 develop and apply to cigarettes biological tests which
2 have meaning in the area of smoking and health.
3 Do you see that?
4 A Yes.
5 Q Does that appear to be the type of testing
6 that you said Philip Morris has agreed not to do?
7 A Yes.
8 Q And it says that there is going to be mice,
9 guinea pigs, cats and monkeys, and I have trouble
10 reading that, have been used, I believe that says,
11 with in vivo procedures.
12 Do you see that?
13 A Yes.
14 Q Have you come to believe that in vivo means
15 live?
16 A Yes.
17 Q These tests were performed by researchers in
18 contract laboratories, where qualified staffs and
19 adequate facilities for animal are available.
20 Do you see that?
21 A Yes.
22 Q There are three methods for which are being
23 sought, lung cancer has been widely acclaimed as
24 being --
25 A Caused.
03826
1 Q Maybe it is -- being caused by cigarette
2 smoking. More recently cardiovascular disease and the
3 respiratory disease of chronic bronchitis and
4 emphysema have been added to the list of strong
5 indictments against smoking. We are actively seeking
6 -- what is that word?
7 A I cannot read that word.
8 Q I can't either.
9 A It could be tests. It could be tests.
10 Q We are actively seeking, we will say tests --
11 we could be wrong, leave a blank spot -- which will be
12 meaningful in the areas of cancer and other

13 respiratory diseases, but we have no tests under study
14 for cardiovascular disease.

15 Do you see that?

16 A Yes.

17 Q Now, it would appear that Philip Morris is
18 talking about doing live animal research inconsistent
19 with the collusive agreement you told us about?

20 A It would appear by 1967 they were cheating on
21 that gentlemen's agreement, yes.

22 Q Or it could be the case that there never was
23 an agreement in the first place?

24 A If that's all there were and there were no
25 mention of the gentlemen's agreement, for example, and

03827

1 things like that.

2 By the way, it is also not clear that this is
3 in house. This is in contract laboratories.

4 Q Let me just make sure we clear that up,
5 Doctor. The point you are trying to make is --
6 whether Philip Morris does its biological research in
7 its basement or across the street in another
8 laboratory, if they felt there was another laboratory
9 that could do it better, the fact is Philip Morris is
10 still doing the research, isn't it?

11 A No. I think in one case Philip Morris is
12 doing the research and in the other case they are
13 paying someone else to do the research.

14 Q For their research? I'm sorry? This is
15 research being done for Philip Morris?

16 A Being done for Philip Morris, but it would be
17 being done by someone else. As Janet Brown said,
18 there were good reasons to do things in house as
19 opposed to doing them at other places.

20 Q But there is also -- there is also good
21 reasons why a company like Philip Morris might decide
22 to do animal research at another laboratory, is that
23 fair to say?

24 A If they didn't think they could do as good a
25 job, that could be another reason.

03828

1 Q Did you learn, in preparing for your
2 testimony in this case, that these -- particularly
3 these inhalation studies where they try to get animals
4 to smoke are very difficult experiments to carry out?

5 A No, I had no idea how easy or difficult they
6 are.

7 Q You saw no evidence they are difficult?

8 A I don't know how difficult, no.

9 Q The point you were making in your testimony
10 is that if you don't do animal research you may not be
11 able to test safer cigarettes, is that correct?

12 A I think if you want to make a claim that a
13 product is safer or doesn't cause cancer in the usual
14 tests, you have to be able to have the tests, you have
15 to be able to perform the tests. If you can't perform
16 the tests, you have difficulty supporting the claims.

17 Q Let's see what Philip Morris was doing.
18 Let's just look.

19 Let's start with -- this is called the
20 primate inhibition study.

21 Do you see that, sir?

22 A Yes.

23 Q Primates -- right away it talks about a

24 certain type of monkey. I won't even try to pronounce
25 that word. Do you see what they are talking about

03829

1 there?

2 A Yes.

3 Q Were given cigarette smoke for a period of
4 eleven months and showed no observable microscopic
5 changes. Three of the six monkeys died during the
6 period, presumably because of extreme high carbon
7 monoxide levels and trauma. The smoking monkeys did
8 exhibit shortness of breath when they attempted to
9 avoid being caught following their exercise periods --
10 following their exercise periods. A fourth monkey was
11 sacrificed before the end of the study because of
12 problems unrelated to smoke exposure.

13 Do you see that?

14 A Yes.

15 Q That is a primate smoking study, is that
16 correct?

17 A Yes.

18 Q Let's look at the next one. Long-term mouse
19 skin painting.

20 Do you see that?

21 A Yes.

22 Q That's the type of research you said they
23 agreed not to do as part of the collusion, right?

24 A Yes.

25 Q It says they did a two-year skin painting

03830

1 program beginning in April 1965.

2 Do you see that, sir?

3 A Yes.

4 Q It was terminated at twenty-one months. The
5 histiopathology and the final report are expected
6 about June 1, 1967.

7 Do you see that, sir?

8 A Yes.

9 Q I asked that question. Let me go on.

10 A Can we go on and read that?

11 Q Yes. Where are you, Doctor?

12 A I was just going to read the next sentence.

13 Q Do you want to read the next sentence?

14 A No, it's all right. Fine. Sorry. I'm
15 sorry. I have never seen the document, so I am just
16 reading it.

17 Q I will go as slow or as fast as you want.
18 But if you want to stop, we will read anything you
19 want. What I am trying to show you is this, they did
20 a lot of animal testing. Do you see number C.

21 Do you see C?

22 A Yes.

23 Q C is another mouse skin painting test, is
24 that correct?

25 A Yes. Apparently.

03831

1 Q It is used by investigators to screen
2 chemicals for carcinogenic potential.

3 Do you see that?

4 A Yes.

5 Q We have abandoned the test because we found
6 it to be insensitive and inaccurate with pure
7 compounds.

8 A Yes.

9 Q You will agree that is a live animal testing,
10 is that correct?

11 A Apparently, yes.

12 Q Let's go to the next one. The next one is
13 carbon monoxide uptake.

14 Do you see that, sir?

15 A Sure. Yes, I see that one.

16 Q It says in this one, inhaled substances which
17 are irritating to lung tissue frequently cause changes
18 in the permeability of the alveolar walls, resulting
19 in lower diffusivity for gases which are exchanged
20 between the alveolar air and blood.

21 Do you see that?

22 A Yes.

23 Q Let's go on and see if this was animal
24 testing that was done.

25 A Study to test this effect with cigarette

03832

1 smoke has failed to date because of the high level of
2 carbon monoxide in the smoke. It was not possible to
3 expose the animals to a high enough smoke
4 concentration to cause changes which lasted longer
5 than the time necessary for the carbon monoxide level
6 resulting from the smoke to be lowered sufficiently to
7 allow the uptake rate determination.

8 Do you see that, sir?

9 A Yes.

10 Q My point is, that is animal testing, is that
11 correct?

12 A Apparently, yes.

13 Q Let's look at the next one. Non-neonatal
14 mouse testing. Recently efforts have been made to
15 shorten the time required for testing carcinogens by
16 the use of newborn mice. We have conducted a pilot
17 study to determine the tolerance of newborn mice to
18 whole cigarette smoke condensate. The condition for a
19 full scale study has been established.

20 More animal testing, sir?

21 A Yes.

22 Q Look at the next one. A mucus flow test.
23 This is with cats. Do you see that, sir, a six month
24 study in progress with cats, which are equipped with
25 tracheal windows. The study is at the mid point with

03833

1 ninety percent of the cats in good condition.

2 Do you see that? Can you read that?

3 A I'm sorry. I was reading the one above. I'm
4 sorry.

5 Q I will slow down.

6 A I'm sorry. You just had me lost in the
7 document. I see it, yes.

8 Q That is another animal study, is that
9 correct, sir?

10 A Yes.

11 Q Apparently cats?

12 A Yes.

13 Q The document then goes on to discuss each of
14 those in more detail. Why don't you look -- does the
15 document go on to discuss each of those animal studies
16 in more detail?

17 A I'm sorry, it's taking me a while. It is
18 hard for me to read the document.

19 Q I am not going to rush you. We can go into

20 more detail if you want. My only question is, if you
21 look at the pages does it appear that Philip Morris is
22 discussing these animals in a little more detail in
23 the pages that follow?

24 A Yes, it does.

25 Q Okay. Now, each of those live animal studies
03834

1 are the type of studies that you say Philip Morris
2 agreed not to do sometime around or before 1963 or
3 1964?

4 A I think they had agreed not to do it prior to
5 that. By 1964, I became first aware that -- it is
6 from documents written in 1963 or 1964 that I became
7 aware that Philip Morris was engaged in the agreement,
8 that's correct.

9 Q Let me show you some later studies as we go
10 further down the road here. Let me show you 1968.
11 I will hand you a document that is in evidence as
12 Defense Exhibit WS499. Let's look at the first page
13 and show the jury what it is.

14 Do you have the front page in front of you?

15 A Yes.

16 Q This is a document that shows a smoking study
17 on a certain type of monkey?

18 A Apparently so.

19 Q It says it is the final report?

20 A Yes.

21 Q It shows the name of the laboratory that
22 Philip Morris had to do the work?

23 A Yes.

24 Q It is called Hazelton Laboratories. Do you
25 see that?

03835

1 A Yes.

2 Q Have you learned in connection in preparing
3 for your testimony in this case that Hazelton
4 Laboratories was one of the premier laboratories at
5 that time in the United States that could do that kind
6 of test?

7 A No.

8 Q You are not familiar with Hazelton at all?

9 A No.

10 Q Let's look at the first page. It says it is
11 a chronic forty-eight week smoking study. These
12 certain monkeys. Final report. And it is submitted
13 to Philip Morris July 18th, 1968.

14 Do you see that?

15 A Yes.

16 Q Does this appear to be the type of animal
17 biological -- live animal study that you say Philip
18 Morris had agreed not to do?

19 A Yes.

20 Q Let's give the jury a sense -- this is a
21 lengthy report. I don't intend to go through the
22 whole report with you. But just to show you the type
23 of biological research Philip Morris was doing in
24 1968, the first page reflects that this is dated July
25 18th, 1968. It says is a final report on this

03836

1 monkey study. Let's just read the summary and see
2 what it says.

3 This study was conducted for the purpose of
4 attempting to define and characterize the effects, if

5 any, in Cynamolgus monkeys, following these forty
6 eight weeks exposure to cigarette smoke. Six monkeys,
7 two males and four females, served as controls. And
8 six members of the monkeys, three of each sex served
9 as test animals. Each animal was restrained in a
10 special chair and fitted with a face mask. At various
11 daily intervals lighted cigarettes were placed in
12 special holders attached to the mask of the test
13 animals.

14 Do you see that, sir?

15 A Yes.

16 Q That is live animal testing, is that correct?

17 A Yes.

18 Q Let me just go over here and show you some --
19 this is on page 3. It says the negative results of
20 the experimental procedure were more important than
21 the changes found. In particular the lack of
22 alteration to the respiratory mucosa, which could be
23 attributed to exposure to tobacco smoke, was of
24 considerable interest when compared to reported
25 findings in human cigarette smokers.

03837

1 Equally impressive was the lack of consistent
2 bronchiolitis or bronchitis since this lesion has been
3 strongly supported as an etiologic factor in the
4 development of emphysema.

5 Do you see that, sir?

6 A Yes.

7 Q Now, let me show you another animal study
8 beyond this one. If there is anything else in that
9 document you want to look at you should feel free to
10 do so.

11 A I have never seen it before. It is a long
12 document. I will probably not try to read it all
13 here.

14 Q Let me show you another one, Doctor. And I
15 don't happen to have a copy of this. But we will try
16 to do it on the screen. This is Defense Exhibit
17 WS242. And I believe -- let's see what it is. I
18 won't characterize it. The heading on it says Toward
19 a Cigarette With Lower Biological Activity. Model
20 studies. A cooperative research program, American
21 Health Foundation and Philip Morris USA, progress
22 report, January 16th, 1976.

23 Do you see that, sir?

24 A Yes.

25 Q Is this collusive agreement still going on at

03838

1 this time not to do live animal research?

2 A I think by this time there is a fair amount
3 of cheating going on in this agreement, yes.

4 Q Or there is no agreement at all?

5 A I don't think that's the case, but -- there
6 are other documents where they continue to talk --
7 where the industry continues to talk about the
8 gentlemen's agreement at this point in time. There
9 was certainly a fair amount of cheating on it. There
10 was certainly a fair amount cheating on if, yes.

11 Q It is just like the CTR, when we were talking
12 about CTR, instead of looking at documents, did you
13 look at what CTR actually -- do you agree it is fair
14 here instead of looking at documents it is important
15 to see what the companies actually did as far as

16 biological research?

17 A To some extent, yes. But I think my position
18 throughout has been there was an agreement, and at
19 points in time the firms were not doing this sort of
20 research. I think -- as people started to cheat on
21 that agreement you saw -- you see this kind of thing
22 coming out.

23 Q Well, let's look at what this kind of thing
24 is. Actually it is interesting if we go over to the
25 -- the next page which says copies, we see an old

03839

1 familiar name there, don't we, Dr. Wynder?

2 A Yes.

3 Q You see he is with AHP -- I'm sorry, AHF, the
4 American Health Foundation?

5 A Yes.

6 Q Does it surprise you that Philip Morris is
7 actually doing live animal biological research in
8 cooperation or in conjunction with Dr. Wynder?

9 A Not necessarily, no.

10 Q Did you know that before you reached your
11 opinion that there was this collusive arrangement
12 number 3?

13 A I think I was aware that some of the
14 companies tried to get Dr. Wynder to work with them,
15 yes.

16 Q And he did work with Philip Morris on this
17 project. Do you see that?

18 A Apparently, yes. I haven't seen this
19 document.

20 Q You want Philip Morris to be doing live
21 animal research, according to your testimony, right?

22 A Yes. And making use of those results to
23 compete actively in the marketplace with healthier
24 cigarettes.

25 Q Let's just see what this study was about.

03840

1 The objective of the cooperative PM, that is Philip
2 Morris, AHF study -- that is the American Health
3 Foundation, sir?

4 A Yes.

5 Q -- is to determine whether chemical
6 composition of three experimental cigarettes varied
7 significantly and whether such variations would be
8 reflected in biological activities.

9 Do you see that?

10 A Yes.

11 Q They are testing experimental cigarettes?

12 A Yes.

13 Q That's what you thought they should be doing,
14 right, if there was not this collusive agreement?

15 A And then competing actively with them on the
16 basis of health, yes.

17 Q Bioassays for this purpose are tests on mouse
18 skin for complete carcinogenicity and for tumor
19 promoting activity, as well as inhalation studies with
20 Syrian golden hamsters, is that correct?

21 A That's what it says, yes.

22 Q Those are live animal tests, is that correct?

23 A Yes.

24 Q Cigarettes were submitted for chemical
25 analytical profiles and representative tar,

03841

1 A-l-i-q-u-o-t-s, from bioassay materials will be
2 analyzed at certain intervals.
3 Do you see that?
4 A Yes.
5 Q This is the type of testing you believed
6 Philip Morris would not be doing if they had this
7 collusive agreement?
8 A If they had managed to make that collusive
9 agreement stick for all time, then I think they would
10 not have been doing that.
11 Q Let's go through quickly. For example, the
12 inhalation study, it appears they used golden hamsters
13 to do the inhalation study?
14 A Yes, apparently.
15 Q And then it describe describes how hamsters
16 are exposed to mainstream smoke. Do you see that?
17 A Yes.
18 Q Let's go over a couple more pages to look at
19 the results. I have highlighted in yellow, we are
20 talking about some of the results from this animal
21 testing?
22 A Yes.
23 Q It says we found also that the tar
24 depositions on the hamster larynx and in their trachea
25 and lung is determined by the tar delivery of the
03842

1 cigarettes.
2 Do you see that?
3 A Yes.
4 Q And then it goes on to talk about the
5 long-term inhalation studies. It says we started the
6 hamster inhalation study back on October 7th, 1975.
7 As was agreed upon, we have the following groups. And
8 then they describe the groups of hamsters they were
9 using.
10 Do you see that, sir?
11 A Yes.
12 Q Let's go over to the next page. They also
13 talk about doing mouse skin painting testing. Do you
14 see that, sir? Can you read that, bioassays on mouse
15 skin?
16 A Yeah.
17 Q Go ahead. That appears to be mouse skin
18 painting?
19 A Appears to be, yes.
20 Q And do you agree that conduct is not
21 consistent with your theory that there was a collusive
22 agreement?
23 A No, I would not characterize my testimony
24 that way, no. I would say that that conduct is
25 consistent with a certain amount of cheating on that
03843

1 agreement, but certainly there are were times prior to
2 this when we weren't doing that kind of testing and
3 where Dr. Wakeham wanted very much to do that kind of
4 testing in-house, but was not able to do it because
5 his superiors felt that that was not a good thing to
6 do given the agreement that they had reached.
7 Q Their idea of cheating -- was there another
8 collusive agreement to cheat?
9 A No. And in a collusive agreement there is
10 always an incentive to cheat on the collusive
11 agreement. Because if others are not providing the

12 goods and services that the customers want, or doing
13 the things that it takes to provide the goods and
14 services that customers want, and you can do that,
15 then you can gain a competitive advantage from doing
16 so. So there is an incentive to cheat.

17 Q Let's talk about the bottom line. Would you
18 please tell the jury what safer cigarette product was
19 slowed down or not developed by Philip Morris because
20 of failure to do animal studies that you think should
21 be done?

22 A I'm not sure what Philip Morris would have
23 come up with had they done this more rapidly. Not
24 Philip Morris, particularly.

25 Q Well, I represent Philip Morris.

03844

1 A I understand that.

2 Q So you don't know -- can you not identify a
3 safer cigarette product that was slowed down or not
4 developed because of the failure to do this live
5 animal testing?

6 A I am trying to think about Philip Morris's
7 particular products. I don't know what Philip Morris
8 -- no, I can't -- in fact, I don't know that Philip
9 Morris has presented a safer product in this time
10 period that we are talking about at all. They haven't
11 produced any of them.

12 Q Are you familiar with the cigarette called
13 Next?

14 A Yes.

15 Q That removes nicotine?

16 A Yes.

17 Q Did you believe that to be a safer cigarette
18 product?

19 A That is not clear to me that is a safer
20 cigarette product.

21 Q Are you familiar with the Accord cigarette?

22 A Vaguely, yes.

23 Q Have you studied the Accord?

24 A I know a little bit about the Accord, yes.

25 Q Does it seem to reduce biological activity?

03845

1 A I am not aware if it does or doesn't.

2 Q You haven't studied it to that extent?

3 A I don't know very much about Accord at this
4 point.

5 Q So do you know if the development of the
6 Accord cigarette was slowed down because of the
7 inability to do animal testing?

8 A I think the Accord -- as I understand it, the
9 Accord is based on -- things that were known quite a
10 long time ago, say in the 1960s, and it is just out on
11 the market now in 1998.

12 So it is entirely possible that that was
13 slowed down by a refusal of the industry to do
14 testing, to delay the amount of testing that it did,
15 yes.

16 Q When you say it is possible, did you see
17 evidence -- did you see evidence that Philip Morris
18 was slowed down in developing an Accord because they
19 didn't do these animal tests?

20 A I haven't seen a document why Accord was
21 produced when it was produced. It is very new.

22 Q So my question is, have you seen any evidence

23 -- any evidence at all that indicates to you that the
24 development of Accord was slowed down because Philip
25 Morris refused to do animal tests pursuant to number

03846

1 3?

2 A I have not seen a document that says that,
3 no.

4 Q Thank you. Let me go to the fourth agreement
5 you have on your chart here.

6 A Okay.

7 Q This is another collusive agreement you have
8 wrote on the chart, is that correct?

9 A That's correct.

10 Q It is the collusive arrangement to share
11 breakthrough on safe products, is that correct?

12 A That is correct.

13 Q Let's talk about that collusive agreement you
14 have talked about in your testimony. If I understand
15 your testimony, you contend that the tobacco companies
16 had a collusive agreement to share in technological
17 breakthroughs that might lead to the development of a
18 safer or safe cigarette, is that correct?

19 A I'm trying to think. Could you repeat the
20 characterization?

21 Q Let me slow down.

22 A Please.

23 Q If I understood your testimony, you were
24 telling the jury when Mr. Ferguson was asking you
25 questions, that you believed the tobacco companies had

03847

1 a collusive agreement to share any technological
2 breakthroughs that might lead to the development of a
3 safer or safe cigarette, is that correct?

4 A I think that is about right, yes.

5 Q If in fact a tobacco company actually
6 discovered the ultimate safe cigarette that was
7 guaranteed not to cause human disease, based on some
8 breakthrough discovery, would it not be in the public
9 interest for that discovery to be shared with the
10 other cigarette companies so that all companies could
11 manufacture those safer cigarettes?

12 A If that would be the result. I doubt that
13 would be the result. But if that would be the result,
14 as a matter of economics, I don't think that would be
15 the result.

16 Q I always remember reading -- Dr. Jonas Salk,
17 who discovered the polio vaccine. Have you heard
18 about him?

19 A Yes.

20 Q You heard he refused to patent the discovery
21 and made it available so the world --

22 A Yes.

23 Q -- people could buy it and have their
24 children cured of polio?

25 A Yes.

03848

1 Q Was that a bad thing he did?

2 A No.

3 Q Did that destroy competition?

4 A No.

5 Q Well, if the tobacco companies decided that
6 they actually -- strike the question.

7 Did you see evidence as you were preparing

8 your testimony that the tobacco companies actually
9 went to the federal government and told the federal
10 government that if they ever discovered the true
11 breakthrough that they were going to share it with
12 each other. Did you see any evidence of that?

13 A No, that I'm aware of, no.

14 Q Do you think that might affect your opinion
15 as to whether there was any actual arrangement that
16 the tobacco companies believed in any way was improper
17 or illegal?

18 A No.

19 Q Normally if people are involved in collusive
20 conduct that is improper, do they go tell the
21 government about it, based on your experience as an
22 economist?

23 A No, typically you don't tell people about
24 your collusive agreements.

25 Q Well, let's look at this. I have an extra
03849

1 copy so I will give it to you. Dr. Solow, I am now
2 handing you what is marked and in evidence as Defense
3 Exhibit AM604. I will put this on the screen so the
4 jury can see what we are talking about here.

5 The heading on this document reflects that --
6 this is -- Defense Exhibit AM604. This says, this is
7 a conference at the office of the Secretary of Health
8 Education and Welfare, May 2, 1968, 4:00 to 6:00 p.m.

9 Do you see that?

10 A Yes.

11 Q Have you seen this document before?

12 A No.

13 Q No one showed this document to you?

14 A No, I have never seen this document before.

15 Q Did you ask the State to show you any
16 documents that might indicate that, that the tobacco
17 companies actually reported to the government that
18 they agreed to share breakthrough information?

19 A I don't think I thought to ask that
20 particular question, no. I certainly asked them to
21 show me any document that had to do with an agreement
22 to share information. I guess it never crossed my
23 mind that such a document existed. If I had known, I
24 would certainly wanted to have seen it.

25 Q It would be important to you as an economist
03850

1 if you found out that the tobacco companies actually
2 told the government that they had agreed to do this?

3 A Not necessarily, no.

4 Q Well, let's see what happened here. It says
5 present was secretary Wilbur J. Cohen. Do you
6 remember Mr. Cohen was actually the Secretary of the
7 Office of Health Education and Welfare at that time.
8 Have you heard his name before, sir?

9 A I don't know if I have heard his name before.
10 I was fourteen at that time, so I probably was not
11 familiar with who was the secretary of Health,
12 Education and Welfare at that time. I mean, I will
13 take your word for it that that's who he was. I
14 probably did not know that.

15 Q That's what the document says?

16 A Yes.

17 Q And you do agree that the Department of
18 Health, Education and Welfare, that is a federal

19 agency of the federal government?

20 A It was then, yes.

21 Q And it shows that this meeting -- you

22 recognize some of these names over here as being

23 people from tobacco companies?

24 A Certainly. CEOs and attorneys, yes.

25 Q And it says secretary Cohen opened the

03851

1 meeting by asking Senator Clements to say a few words.

2 So apparently we have a U.S. senator at the meeting?

3 A Apparently so.

4 Q Let me go to the portion of the document that

5 relates to my point here, as far as this breakthrough

6 agreement. By the way, if you look at this document,

7 this is a document that is dealing with this issue of

8 forming the Tobacco Working Group, which is this joint

9 cooperative effort between the federal government and

10 the tobacco companies, to see if they could develop a

11 safer cigarette, is that correct?

12 A I don't know. I haven't had a chance to read

13 the document. So I don't know for certain whether

14 that is what this is about.

15 Q Here. Let me try to help you then. Maybe go

16 to page 7. This is not my point, but it puts it in

17 perspective. It is talking about an agreement has

18 been reached at the National Institutes of Health that

19 the less hazardous cigarette program will be managed

20 and directed by Dr. Paul Kotin, K-o-t-i-n. Do you see

21 that?

22 A Yes.

23 Q Does this appear to be a document that is

24 dealing with that project? Go ahead and look at the

25 document if you want to, sir.

03852

1 A There certainly seems to be a less hazardous

2 cigarette program, yes.

3 Q Let's go over to page 9. Can you go to page

4 9 with me, sir?

5 A Okay.

6 Q Mr. Harrington -- is he with the tobacco

7 companies, sir?

8 A Yes, I believe so.

9 Q Mr. Harrington stated that each of the

10 companies had done extensive research work and that

11 the industry could cooperate by furnishing, say to Dr.

12 Kotin, the results of this research which would result

13 in an economic savings if nothing else.

14 Do you see that?

15 A I do.

16 Q And then we go down a little bit later. Dr.

17 Endicott -- he is with the government, is that

18 correct?

19 A Yes, I believe so.

20 Q Dr. Endicott said, the NIH -- that's the

21 National Institutes of Health, is that correct?

22 A Yes.

23 Q -- had worked with the pharmaceutical people

24 for ten years and much of the information submitted by

25 that industry had been of a confidential nature and

03853

1 there had been no leaks.

2 Do you see that, sir?

3 A Yes.

4 Q Then Mr. Finch speaks, he is with the tobacco
5 companies, is that correct?

6 A Yes.

7 Q Mr. Finch stated that the companies and the
8 industry had never discussed among themselves -- --
9 Mr. Finch stated that the companies in the industry
10 had already discussed among themselves the matter of
11 handling any method of making a safer cigarette,
12 should it be found that present cigarettes are not
13 safe, and they all had agreed informally to share such
14 information with each other.

15 Mr. Galloway stated that if the companies and
16 the government cannot trust each other then we cannot
17 work together.

18 Do you see that, sir?

19 A Yes.

20 Q So you were not aware that the tobacco
21 companies told the government that they were willing
22 to share this type of breakthrough information?

23 A I was not aware that they had told the
24 government that they were undertaking arrangement
25 number 4, which apparently quite clearly they were.

03854

1 Q I'm sorry, what?

2 A Arrangement number 4, which apparently quite
3 clearly they were.

4 Q Let's talk about that. Because you told the
5 jury, I believe, that you didn't actually ever see any
6 evidence that the tobacco companies ever shared any
7 breakthrough information?

8 A No. It seems quite clear from this document
9 that you just showed me that there is no doubt
10 whatsoever that they did in fact agree to number 4. I
11 have never seen this.

12 Q And, sir, if -- I asked you questions earlier
13 about the Tobacco Working Group. Do you recall that?

14 A Yes.

15 Q A ten year project.

16 A I can't recall that, but if you say so, yes.

17 Q And for the tobacco companies to work with
18 the government, together with the government to
19 discover a safer cigarette, by the nature of that work
20 it is going to be shared with everybody, isn't it?

21 A If in that setting they arrive at any
22 breakthroughs, yes.

23 Q And was the government part of this collusive
24 agreement?

25 A No. I think the government was probably

03855

1 interested in discovering if there were a safer
2 product.

3 Q So the government was colluding -- let me
4 just finish, Doctor.

5 If I understand your testimony then, the
6 government, when it worked with the tobacco companies
7 to share breakthrough information, that it is
8 colluding with the tobacco companies under agreement
9 number 4?

10 A No. That's a total -- I think a total
11 mischaracterization of my opinion.

12 Q Why?

13 A For one thing, the government is not in the
14 business of producing safer products. The government

15 has an interest, I think, in passing that information
16 on. It is the companies that are concerned that
17 sharing information removes the incentive to do the
18 sort of research that it takes to provide a safer
19 product, and that it removes that kind of research or
20 suppresses that kind of research as a matter of taking
21 competitive advantage. The government is not a
22 competitor of the tobacco industry.

23 Q Doctor, maybe you missed my point. The
24 government asked the tobacco companies jointly to come
25 work with the government and try to develop a safer

03856

1 cigarette.

2 Do you understand that?

3 A I will take your word for that. But I don't
4 think that is so. Yes.

5 Q And therefore -- and the tobacco companies --
6 we talked about this earlier, and I don't want to go
7 back through it again. You became generally aware the
8 tobacco companies for a number of years had meetings
9 and worked with the government trying to develop safer
10 cigarettes, is that correct?

11 A Yes.

12 Q By the nature of that project, whatever they
13 discovered would be shared with each other, wouldn't
14 it?

15 A Anything they revealed during that project
16 would, yes. But there is also the opportunity to do
17 work on your own in the interests of gaining a
18 competitive advantage and trying to make -- I mean,
19 pharmaceutical companies do lots and lots of work
20 trying to find cures for diseases. They also work
21 with the government. But they spend vast sums of
22 money trying to find drugs to cure diseases. And they
23 don't, generally speaking, share the results of that
24 information with their competitors. The profit motive
25 is to be able to get there first and win the

03857

1 competitive battle.

2 Q And that's exactly what the tobacco companies
3 did, didn't they?

4 A No, I disagree entirely.

5 Q Doctor, they worked with the government for a
6 period of years, is that correct?

7 A Apparently, yes.

8 Q But also at the same time they were working
9 to develop their own safer cigarettes and they never
10 shared one breakthrough, did they?

11 A I'm not aware they did. But they had an
12 agreement not to.

13 Q Let's find out. I thought that's what you
14 told us on direct examination. Let's get our list of
15 safer products here. Here we go.

16 Did you find any evidence that BATCo or B&W
17 shared any breakthrough information regarding Ariel
18 with the other companies?

19 A No.

20 Q In fact, they patented the Ariel process, did
21 they not?

22 A They had some patents on the Ariel, yes.

23 Q In fact, that is a B&W product, is it not?

24 A I believe so.

25 Q Did you see any evidence that B&W shared any

03858

1 information regarding Fact?

2 A Not to my knowledge.

3 Q They actually patented the process for Fact,
4 did they not?

5 A I believe so, yes.

6 Q The Imperial cigarette, did you see any
7 evidence that that was shared with any other company?

8 A I think the Imperial cigarette never got far
9 enough -- I think Imperial was told to stop doing
10 research before any research was done.

11 Q Was there any sharing of breakthrough
12 information regarding Imperial?

13 A I don't think there was any information,
14 because I think Imperial was told to stop it by BATCo,
15 and therefore there was nothing to share because there
16 was no result.

17 Q So nothing was shared?

18 A There was no result. No information to
19 share, so nothing was shared.

20 Q Let's look at the next product we talked
21 about this morning, the palladium, XA?

22 A Yes.

23 Q Liggett & Myers product?

24 A Yes.

25 Q They didn't share any of that with the world,

03859

1 did they?

2 A No, clearly Liggett & Myers did not.

3 Q In fact, they patented the process, did they
4 not?

5 A Yes.

6 Q To protect it?

7 A That's correct.

8 Q Saratoga was a Philip Morris cigarette?

9 A Yes, I believe so.

10 Q Philip Morris -- strike the question.

11 You didn't see any evidence that Philip
12 Morris ever shared any of the Saratoga technology with
13 any other company, did you?

14 A No.

15 Q They patented the Saratoga, did they not?

16 A I don't know if they did or didn't. I'm not
17 certain.

18 Q You saw no evidence that they shared the
19 technology, did you?

20 A No.

21 Q Premier, did you see any evidence that
22 Reynolds shared any breakthrough technology regarding
23 Premier?

24 A No.

25 Q They patented Premier, did they not, with a

03860

1 number patent?

2 A I believe so, yes.

3 Q I could add more on here. The Philip Morris
4 Accord cigarette. You said you generally are aware of
5 the Accord?

6 A I am somewhat aware of what Accord is.

7 Q It has been marked in evidence -- have you
8 seen this product before?

9 A I haven't seen one physically, no. I have
10 heard descriptions of them. I have not seen one

11 physically.
12 Q I am not going to spend a lot of time on it.
13 Other witnesses have talked about the product. It is
14 basically -- strike the question.
15 A It is a heating device, I understand.
16 Q It is heating --
17 A Variation of the heating as opposed to
18 burning.
19 Q Do you know anything about the technology
20 that went into designing this product?
21 A Not particularly, no, not the details of it.
22 Q Did you see any evidence that Philip Morris
23 ever shared any of the technology to develop this
24 product with any other tobacco company?
25 A No.

03861

1 Q In fact, they patented, did they not?
2 A I believe so.
3 Q The other cigarette Philip Morris developed
4 was the Next product, do you remember hearing about
5 that?
6 A I have heard of Next.
7 Q Did you see any evidence that Philip Morris
8 ever shared any breakthrough information about Next
9 with any other competitor?
10 A No.
11 Q They patented the process, did they not?
12 A They did, yes.
13 Q Thank you. I have one last area I want to
14 cover with you. I want to clean one area up. And
15 then I am going into my last area of questions for
16 you, Doctor.
17 A Okay.
18 Q You told us last week in response to one of
19 my questions that Liggett and Meyer joined this
20 collusive agreement number 1. Are you with me? I
21 want to make sure -- are you talking about the first
22 agreement now?
23 A I understand that you are talking about the
24 first agreement.
25 Q I think you told me last week that you

03862

1 believed Liggett & Myers had joined that collusive
2 agreement at least by January '64?
3 A I'm not sure -- no, I think that is a
4 misstatement.
5 Q Let me just try to refresh your memory,
6 Doctor. We had a break, and you came back after a
7 break and told me that you had found the Tobacco
8 Institute document dated in January of 1964. Do you
9 recall that now?
10 A Yes. Okay. I'm sorry. Thank you.
11 Q I am not trying to confuse. Do you remember
12 what I am talking about?
13 A Yes.
14 Q All I am trying to pin down, you told us last
15 week at least by January of 1964 that document you
16 said told you that Liggett was part of this collusive
17 agreement, is that correct?
18 A That's right. It seemed to me at that
19 point that Liggett was taking part in a meeting at
20 which the firm -- the companies agreed that they would
21 not compete on the basis of health claims.

22 Q I think you also told us, though, you could
23 not pinpoint exactly when they joined prior to 1964,
24 is that correct?

25 A I think that's right, yes.

03863

1 Q And am I correct that it is your opinion that
2 Liggett & Myers had -- was only part of this agreement
3 for about three or four years, and then they withdrew,
4 is that correct?

5 A Of the whole conspiracy, of the whole cartel?

6 Q I am asking you.

7 A I am trying to clarify the question.

8 Q I am asking you -- here is my question.

9 During the entire period of cartel, whatever it ran,
10 however long it lasted, for its entire lifespan, is it
11 your testimony that Liggett & Myers was only joined as
12 part of it for three or four years and then withdrew?

13 A No. I think that is the CTR, that they were
14 part of the CTR, is my recollection, and the cigarette
15 advertising code and things like that. I think in
16 1978 when they refrained from offering the XA product,
17 I think they were refraining from competing on the
18 basis of health.

19 Q Maybe I am confused. I need to check one
20 point for a minute here.

21 THE COURT: Why don't we go ahead and take
22 the break.

23 (At this time a short break was taken.)

24 THE COURT: Please sit down.

25 BY MR. WEBB:

03864

1 Q Doctor, I think I can try to get through this
2 reasonably quickly. I want to make sure I know what
3 your testimony is on Liggett & Myers. Let's take one
4 agreement at a time.

5 Let's start with number 1. This is the
6 agreement not to advertise on the basis of health. Do
7 you see that?

8 A Yes.

9 Q I believe that is the agreement you told me
10 at least by January of 1964 Liggett & Myers had joined
11 this collusive arrangement, is that correct?

12 A Yes, I believe, at least to some extent they
13 had joined into that by '64.

14 Q To some extent. Are they in the agreement at
15 that point?

16 A They seem to be taking a common -- joining
17 the common approach to not making statements outside
18 of the industry as a whole, and the one comment that I
19 read was that on the basis of advertising, if anyone
20 went their own way there would be vulnerability. So,
21 yeah.

22 Q Am I right, can you tell me when before 1964
23 they actually agreed to become part of this
24 arrangement?

25 A I cannot tell you -- date it precisely.

03865

1 Q Not precisely, at all. Can you date it at
2 all?

3 A No, I can't. The earliest -- the earliest
4 document I have seen that I can think of -- there are
5 lots of documents. The earliest one I can think of is
6 that one I found for you.

7 Q That is January 1964?
8 A Yes.
9 Q How long after January 1964 did Liggett &
10 Myers remain part of a collusive agreement number 1,
11 that is the arrangement not to advertise on the basis
12 of health?
13 A Well, I think they were getting ready to
14 break out of that, to cheat on that agreement in 1978,
15 but in the end did not introduce the XA product as a
16 result of pressure brought by other members of the
17 conspiracy. And so at least in 1978, I think they
18 were still holding to that.

19 Q Had they been -- has Liggett & Myers been
20 continuously part of this collusive arrangement of
21 number 1, that is the arrangement not to advertise on
22 the basis of health, continuously from 1964 up to the
23 current date?

24 A It is kind of hard to say exactly where they
25 are in and where they are out. I think in 1964 they

03866

1 are pretty clearly in, because in 1964 there is a
2 document that indicates that they are agreeing with
3 the other major companies not to advertise on the
4 basis of health. I guess I think in 1978, 1979 when
5 they agree not to produce the XA under pressure from
6 the other firms in the industry, that they are
7 agreeing not to advertise the health basis -- in fact,
8 they are agreeing not to produce XA at all at that
9 point in time.

10 After that it is kind of hard to say. I
11 haven't seen any evidence that Liggett & Myers is
12 actively advertising on the basis of health at the
13 moment either.

14 Q So your testimony is you don't know when they
15 are in or when they are out?

16 A It is hard to see precisely -- I have given
17 you points in time when I think they are in. I
18 haven't seen anything to suggest they are out at the
19 moment.

20 Q So they are still in today?

21 A As far as I know.

22 Q Let's go to agreement number 2. This is the
23 arrangement to mislead the public about smoking and
24 health. When did they join this agreement?

25 A Again, my understanding is they came into the

03867

1 CTR sometime in the early '60s. I think, again, just
2 about the same time that they were part of that
3 arrangement that we spoke about just a second ago, the
4 agreement not to advertise.

5 So they were taking part in the Tobacco
6 Institute, CTR agreement to present a common front
7 about the industry's position on smoking and health at
8 that point in time.

9 Q How long did they stay in, Doctor, just so --
10 on agreement number 2, so I understand, they came in
11 the early '60s, and how long did Liggett remain as
12 part of this collusive agreement?

13 A I know that Liggett has since -- just in the
14 last few years basically said -- made the admission
15 that they believe that there is a link between smoking
16 and cancer. So I think that Liggett seems to have
17 broken ranks just in the last few years. So I think

18 by now Liggett seems to admit that there is a link
19 between smoking and cancer.

20 Q So they were in continuously from the early
21 1960s until when, approximately?

22 A I think it is -- I can't recall exactly when
23 it was that Liggett agreed, but I think it is just in
24 the last couple of years. Since the testimony of the
25 CEOs to Congress where the CEOs maintained there was

03868

1 no evidence, they did not believe that there was a
2 link between smoking and cancer, and did not believe
3 that -- I am just trying to date it as best I can. I
4 think it was in 1994. I think it was subsequent to
5 that that Liggett said we admit there was a link.

6 Q So they were part of it from the early 1960s
7 to 1994?

8 A Yes.

9 Q You told the jury just last week they were
10 only in this one for three or four years, didn't you?

11 A No, I think that was being a part of the CTR.

12 Q That's what this one is, this is the CTR
13 agreement?

14 A It goes beyond simply being a member of CTR.

15 Q I'm sorry. When Mr. Ferguson pointed to this
16 number 2, you told him what this agreement was about,
17 was about using CTR as a front for the tobacco
18 industry and to use CTR not to get to the truth of
19 smoking and health, didn't you?

20 A That is a piece of it, yes.

21 Q What's the -- never mind. Strike the
22 question.

23 Number 3, how long is Liggett & Myers in
24 agreement number 3 not to refrain from in-house
25 testing of live animals, or were they ever in that

03869

1 agreement?

2 A I have not seen a reference to Liggett &
3 Myers specifically. I know that Liggett & Myers
4 pretty much early on decided to take Dr. Wynder's
5 research seriously, although they didn't do it
6 in-house, they did it at the Arthur D. Little
7 laboratories. But they -- pretty much from the
8 beginning they took the question of Dr. Wynder's
9 results seriously.

10 Q Were they in this agreement, sir, number 3?

11 A I have not seen a document that says
12 specifically they were. The documents they said --
13 refer to industry arrangements, in -- gentlemen's
14 agreements in the industry. I think that Liggett &
15 Myers -- I think that -- my reading of the document is
16 that Liggett & Myers was doing out-of-house testing on
17 live animals in the -- for quite some time, and that
18 the industry was aware of that.

19 Q Just tell me, were they part of this
20 agreement, number 3?

21 A I think -- I guess -- the documents -- I
22 think the documents suggest that the industry is. I
23 have not seen anything that says that the industry,
24 except for Liggett & Myers, is in this agreement. On
25 the other hand, I think it was clear to the people in

03870

1 the industry that Liggett & Myers was not following
2 the agreement.

3 Q Is your answer yes or no?
4 A Yes.
5 Q They are in?
6 A I think -- I haven't seen anything to say
7 they were out. So, yes, I think they were in.
8 Q Agreement number 4, Liggett & Myers joined
9 that agreement, the agreement not to share
10 breakthroughs?
11 A Again, I have not seen anything that says
12 that -- the statements I have seen about those
13 arrangements did not specify that they were
14 arrangements that exclude Liggett & Myers, so I have
15 to think when people talk about the industry they are
16 talking about everyone.
17 Q Let me go to my last area of questioning,
18 Doctor, which deals with, as I understand, kind of the
19 bottom line of your testimony.
20 You told the jury at the end of Mr.
21 Ferguson's questions, that it is your conclusion that
22 the State of Washington suffered an economic injury as
23 a result of these collusive agreements, is that
24 correct?
25 A Yes, I believe that the State of Washington
03871
1 was injured.
2 Q I'm sorry, what?
3 A Yes, I believe the State of Washington was
4 injured.
5 Q Suffered an economic injury?
6 A Economically, yes.
7 Q If I understand what you were explaining to
8 the jury, it is your testimony that it is -- because
9 if these collusive agreements had not taken place the
10 State would have had to pay out less money in
11 smoking-related health care costs, is that correct?
12 A That's my understanding, yes.
13 Q Is that your testimony?
14 A That is my belief, yes.
15 Q And if I understand your testimony, you
16 actually have to go through five levels of assumptions
17 before you get to that conclusion, is that correct?
18 A I'm not sure I mentioned five levels --
19 Q Let me go through and see if I have it right.
20 Tell me where I'm wrong. If I understood your
21 testimony, your economic logic goes like this.
22 Number one, if these alleged collusive
23 agreements had not taken place you believe a safer
24 cigarette product would have been introduced into the
25 marketplace sooner, is that correct?
03872
1 A I think in all likelihood that is true, yes.
2 Q Number two, you also believe if there had not
3 been these collusive agreements there would have been
4 more information regarding smoking and health
5 available in the market, is that correct?
6 A More -- I'm not sure I would characterize it
7 that way. I think I would say that more truthful
8 information would have been available in the
9 marketplace. Again, I would be awfully careful about
10 using the term marketplace with regards to
11 information. I think that people would have known the
12 truth about smoking and the public health community
13 would have known the truth about smoking and health,

14 and with more certainly.
15 Q So truthful and more certain information
16 sooner?
17 A Yes, early.
18 Q Earlier, is that what you are saying?
19 A Yes.
20 Q Number 3, then you contend if the safer
21 product had been available earlier and there had been
22 more certain and truthful information available
23 earlier, then Washington Medicaid recipients who
24 smoked would have made different smoking related
25 decisions, is that correct?

03873

1 A Yes, I think that is reasonable.
2 Q And then you go to the fourth level, and that
3 is if the Washington Medicaid recipient smokers had
4 made different smoking decisions they would have had
5 less smoking-related illness, is that correct?
6 A Yes.
7 Q And then you get to your last step, which is
8 then the State would have paid less in health care
9 costs?
10 A Yes.
11 Q I would like to go through those five steps,
12 because I want to make sure I understand what you
13 actually -- where we have to go to get down to the
14 State having an economic injury. We start here with
15 number 1 -- well, as I understand it, this -- we will
16 call this the State injury if certain things happened.
17 Are you with me?
18 A Yes.
19 Q First we need to have safer products, these
20 are cigarette products, earlier, is that correct?
21 A That's one component of it, yes.
22 Q I want to make sure I understand. Let's take
23 each at a time and ask you a few questions, okay.
24 A Okay.
25 Q Are you with me?

03874

1 A I guess so.
2 Q In what year would this safer product have
3 been introduced into the marketplace, if there had not
4 been these collusive agreements?
5 A I am not sure I can say for certain in what
6 year things would have been introduced sooner.
7 Q Are you just going to guess, then?
8 Strike the question, your Honor. I strike
9 the question.
10 If you don't know what year, would it have
11 taken place before the Medicaid program started in
12 this state?
13 A It might have, it might not have.
14 Q If we don't -- by the way, this safer
15 cigarette, if it had only been in the market for say
16 two years versus twenty years, would that effect the
17 economic injury?
18 A It would presumably affect the magnitude of
19 the injury, but it wouldn't necessarily affect the
20 existence of the injury.
21 Q This so-called safer cigarette, would it have
22 resulted in, for example, no lung cancer? Strike the
23 question.
24 What smoking-related diseases would be

25 reduced or eliminated by your safer product?

03875

1 A It depends on the safer product that would
2 have been produced. Conceivably any and all of the
3 diseases that are related to smoking.

4 Q Instead of saying conceivably -- as far as
5 your opinion that there was an economic injury, when
6 you reached that opinion, what did you assume, that
7 lung cancer would be eradicated?

8 A No.

9 Q Did you assume lung cancer would be reduced?

10 A It is my belief that lung cancer would have
11 been reduced if there had been safer products, or if
12 people had known more -- the truth about smoking and
13 health and hadn't been misled by the industry.

14 Q I will get to information. Let's just stick
15 to safer products for a moment, okay? What is there
16 about the safer cigarette that would have reduced lung
17 cancer?

18 A Well, for example, the XA did not create --
19 did not cause the tumors in mice, and my understanding
20 is that the health community considers that indicative
21 of the link between the safety of the product and
22 human beings.

23 Q Anything else?

24 A Just generally that there are -- for example,
25 there are products that remove the bad guys, as Ross

03876

1 Johnson refers to them, the cancer causing compounds,
2 reduces the number of the cancer causing compounds,
3 and that those things would be safer, too. Exactly
4 what would have happened is difficult to say because
5 the cartel interfered with that. But in all
6 likelihood it could have been the XA, it could have
7 been something like Premier, but ten years earlier.
8 It could have been a number of possibilities.

9 Q It could have been, but which one was it?

10 A We don't know for certain because the cartel
11 delayed it, and so we will never know quite how the
12 world would have been like absent the cartel.

13 Q Then how do you know the State suffered an
14 economic injury if you don't know what the safer
15 product would be?

16 A I am saying its more likely than not they
17 would have. This is a standard problem with cartels,
18 that once they interfere with the market we never get
19 to see what would have happened in the absence of
20 them.

21 Q Are you guessing there would have been an
22 injury?

23 A No, I'm not guessing.

24 MR. FERGUSON: Objection. Argumentative.

25 THE COURT: Sustained.

03877

1 BY MR. WEBB:

2 Q Are you assuming lung cancer would be reduced
3 or there would be no lung cancer at all in Medicaid
4 recipient smokers?

5 A I don't believe there would be no more lung
6 cancer at all.

7 Q What percent did you assume would be reduced?

8 A I have not made a calculation on how big the
9 affect would be.

10 Q At all?
11 A No, not at all.
12 Q Did you attempt to?
13 A No.
14 Q Did you attempt to estimate how much
15 reduction there would be in, for example, emphysema?
16 A No.
17 Q How about cancer of the larynx?
18 A No.
19 Q Cancer of the esophagus?
20 A No.
21 Q Cancer of the pancreas?
22 A No.
23 Q No idea what that percent would be?
24 A I have not tried to estimate the magnitude of
25 the reduction.

03878

1 Q Would the safer product have nicotine in it?
2 A I believe that in all likelihood the safer
3 product would have had nicotine in it because the
4 indication, from what I have read in the documents, is
5 that consumers smoke cigarettes in order to get a dose
6 of nicotine, and without that dose of nicotine it
7 doesn't satisfy the demand that they have. That's
8 what they are addicted to. And so those products tend
9 not to work very well.

10 So I imagine it would have had nicotine in
11 it. For example, the XA, as I understand it, had
12 nicotine in it. The Premier has nicotine in it,
13 Saratoga has nicotine in it, and so forth.

14 Q I take it you agree Dr. Burns and Dr.
15 Henningfield are better experts than you are on safer
16 cigarettes?

17 MR. FERGUSON: I'm sorry. I didn't hear you.
18 Is it safe or safer?

19 MR. WEBB: Safer.

20 THE WITNESS: Yes, I think Dr. Burns and Dr.
21 Henningfield are in a better position to evaluate the
22 technological aspects of cigarettes and their
23 implications on health.

24 BY MR. WEBB:

25 Q Did you hear their testimony on their opinion

03879

1 as to whether a cigarette would be safer if it still
2 had nicotine in it?

3 A I can't say that I was here -- I certainly
4 wasn't here for Dr. Burns. I can't say that I was
5 here for Dr. Henningfield's testimony on that.

6 Q How much tar would be in this hypothetical
7 safe cigarette you are talking about, or assuming?

8 A I don't know for certain.

9 Q Would it have more than three milligrams of
10 tar?

11 A I do not know for certain.

12 Q Would that hypothetical cigarette work if it
13 had removed all benzo(a)pyrene?

14 A Perhaps not all. I don't know for certain.

15 Q Would it have removed all nitrosamines?

16 A Again, the same answer.

17 Q Would it have removed all carbon monoxide?

18 A I don't know if it would have removed all or
19 not, no.

20 Q Would it have removed some of them?

21 A It could have.
22 Q Or would it?
23 A It could have.
24 Q How about oxides of nitrates? Would it have
25 removed oxides of nitrates?

03880

1 A It could.
2 Q How much would it cost -- how much would this
3 hypothetical safe cigarette cost in the marketplace?
4 Have you done an analysis of that?
5 A No.
6 Q Have you done any economic analysis to figure
7 out how many people would buy the safer product?
8 A No.
9 Q Let me go to the second assumption. I am
10 going to simplify this. But you say more truthful and
11 certain information -- more information to shorthand,
12 more certain and truthful information?
13 A Yeah, or less untruthful information, and I
14 think consumers would have had more certainty about
15 the nature of the relationship.
16 Q So under this assumption -- I put S and H for
17 smoking and health -- more certain and truthful
18 smoking and health information earlier?
19 A Yes.
20 Q Is that correct?
21 A Yes.
22 Q Now, let me just ask you a few questions
23 about that. We have talked about CTR, and I am not
24 going to go back through all that right now, but have
25 you done any studies of the Washington Medicaid

03881

1 population in order to determine what smoking and
2 health information they were aware of at any given
3 point in time?
4 A No.
5 Q Have you seen any evidence in connection with
6 preparing for your testimony that would indicate to
7 you that the members of the Washington State Medicaid
8 population who smoked were any less knowledgeable
9 about smoking and health issues than the general
10 population?
11 A No, not necessarily.
12 Q Now, you are aware that -- you are aware the
13 State's Medicaid program began in 1969, is that
14 correct?
15 A That seems about right to me, yes.
16 Q You are aware that the surgeon general
17 released the 1964 surgeon general report that
18 concluded that cigarette smoking causes lung cancer
19 five years earlier, in 1964, is that correct?
20 A That makes sense, yes.
21 Q Did -- do you have any reason to believe that
22 the people who make up the Washington Medicaid
23 population who smoke were unaware of the conclusions
24 reached by the surgeon general?
25 A No, not any more than anyone else. No.

03882

1 Q You are aware in 1966, three years before the
2 State's Medicaid program began, Congress made it
3 mandatory that cigarette packages have a warning label
4 on them, is that correct?
5 A I thought it was 1972. We talked about it

6 last week.
7 Q Sorry. It was 1966. The first warning label
8 went on in 1966, which required a warning that stated
9 cigarettes may be hazardous to your health.
10 A I thought you told me last week it was 1972.
11 I will take your word for it.
12 Q They changed the warnings in 1972.
13 A I'm sorry.
14 Q I'm not trying to mislead you.
15 A I am aware there were warning labels, yes.
16 Q Before the State Medicaid program began, is
17 that correct?
18 A I will take your word for it that it was
19 1966. You have now managed to confuse me a little bit
20 from what we talked about last week. I will take your
21 word for it, yes.
22 Q Have you seen any evidence that the people --
23 the members of the Medicaid population in Washington
24 who smoked -- have you seen any evidence that they did
25 not understand or were not aware of the warning label

03883

1 on cigarettes?
2 A No.
3 Q If I understand, the third assumption we are
4 making is that Medicaid smokers, you believe, would
5 have made different smoking choices if one and two
6 were in place?
7 A I said if either one or two had been in
8 place.
9 Q So what you are telling the jury is if there
10 had been safer products earlier, more truthful and
11 certain information about smoking and health earlier,
12 then Washington Medicaid smokers would have made
13 certain different smoking choices? That's in your
14 chain of logic, is that correct?
15 A I think that is likely.
16 Q Let me ask you a few questions about that.
17 What percent or number of the Medicaid recipient
18 smokers in the State would have switched to the safer
19 product?
20 A I don't know for certain.
21 Q You don't have any percentage at all, or a
22 number?
23 A No. Again, we will never know for certain
24 how the world would have been, had the industry not
25 been involved in this conspiracy, because they were.

03884

1 Q Then how do we know the State suffered an
2 economic injury if we don't know for sure?
3 A Because we do see that when information is
4 provided to consumers they respond to it.
5 Q Okay. Well, that's what I am trying to find
6 out about.
7 Have you studied the smoking habits of the
8 Washington Medicaid population?
9 A No, not specifically.
10 Q Let's start with, have you gone out to
11 interview any of the folks that are part of the
12 Washington State Medicaid population to find out if
13 they actually would have switched to a safer
14 cigarette?
15 A No.
16 MR. FERGUSON: Your Honor, I object on

17 foundation grounds. The defendants know Dr. Harris
18 reviewed this material for the State, not Dr. Solow.

19 THE COURT: Overruled.

20 THE WITNESS: No, I have not interviewed
21 Washington Medicaid smokers, no.

22 BY MR. WEBB:

23 Q If you haven't interviewed any, have you at
24 least studied any surveys or samplings of the
25 Washington Medicaid population to see if they would

03885

1 have switched to a safer product?

2 A No.

3 Q You have not done that?

4 A No.

5 Q Have you studied any other Medicaid
6 population outside this state to reach that
7 conclusion?

8 A No.

9 Q Now, as far as these different smoking
10 choices, are you making the assumption -- let's move
11 on to this next one.

12 Are you making the assumption if there had
13 been more information available sooner, that some
14 Washington Medicaid smokers would never have started
15 smoking in the first place?

16 A I think that is entirely likely.

17 Q When you say it is likely, my question is,
18 have you gone out and done any study to see whether
19 that is true or not?

20 A No. Not personally, no.

21 Q Have you done it impersonally?

22 A As I said, I am relying on Dr. Harris's
23 report. But it certainly seems entirely reasonable to
24 me -- people do seem to respond to the information,
25 both in terms of quitting, in terms of initiating and

03886

1 in terms of how much smoking they do.

2 Q I mean -- this testimony that you gave that
3 the State suffered an actual real economic injury, did
4 you do any analysis why Medicaid smokers in this state
5 start to smoke in the first place?

6 A No, I did not.

7 Q Did you do any study as to why they quit, why
8 Medicaid smokers quit?

9 A No, I did not.

10 Q So you are assuming that, correct, there
11 would be different smoking choices?

12 A I am relying on Dr. Harris's report, which I
13 have read, and which seems to me makes an awful lot of
14 sense.

15 Q Dr. Harris is going to testify and we will
16 cross-examine him. But independent of Dr. Harris's
17 report, have you made any study to see whether
18 Washington Medicaid smokers would have made different
19 choices?

20 A No, I have not studied that differently. I
21 am relying largely on Dr. Harris's opinion. Although,
22 as I said before, it does seem to be the case if you
23 look at smoking and information, that people respond
24 to information. There -- there are other economists
25 who have reached that opinion as well.

03887

1 Q Just so I know, so we can tell the jury, what

2 percent or number would never have started smoking in
3 the first place?

4 A I do not know.

5 Q Do you have any idea?

6 A No, I can't tell you for certain.

7 Q What number or percentage of the smokers
8 would quit if there was more information available?

9 A I do not know for certain.

10 Q You have no idea?

11 A I do not know for certain.

12 Q Do you have any idea?

13 MR. FERGUSON: Objection. Repetitive.

14 THE COURT: Overruled.

15 THE WITNESS: I do not have an estimate.

16 BY MR. WEBB:

17 Q So whether it is one percent or ninety
18 percent, you don't know?

19 A No.

20 Q If I understand your fourth assumption, it's
21 that if one, two and three happened to turn out to be
22 correct, then Medicaid smokers would have less health
23 care costs, is that correct?

24 A Related to smoking, yes.

25 Q I will articulate. Less health care costs

03888

1 because they would have less smoking related disease?

2 A Yes.

3 Q Let me is ask -- again, that is assuming
4 there were the safer products earlier or more
5 information available earlier, then people would have
6 made different smoking choices?

7 A Yeah.

8 Q And then we get down to level 4, that they
9 would have less smoking related disease, is that
10 correct?

11 A Yes.

12 Q For example, did you make the assumption that
13 people would have less heart disease?

14 A I think that's a reasonable conclusion to
15 reach potentially, yes. Yes, there seems to be a link
16 between smoking and heart disease, so less smoking or
17 smoking of safer products would presumably lead to
18 less heart disease.

19 Q When you say presumably, you do understand --
20 am I correct you understand heart disease can be
21 caused by factors that have nothing to do with
22 smoking?

23 A Certainly.

24 Q You understand that scientific and public
25 health believe that diet may affect heart disease?

03889

1 A Certainly.

2 Q Lack of exercise may affect heart disease?

3 A Yes.

4 Q Heredity may affect heart disease?

5 A Yes.

6 Q Whether you are a male or female may affect
7 heart disease?

8 A Yes.

9 Q Did you do any study or analysis so you could
10 determine whether or not the lesser amount of heart
11 disease would be attributable to smoking or some of
12 these other factors?

13 A I think you have to hold all else constant.
14 I understand one of the factors that lead to heart
15 disease is whether people smoke or not. To the extent
16 they are doing less smoking, that would lead to less
17 heart disease. I didn't say it would eliminate heart
18 disease. There would be less heart disease.

19 Q Have you done any type of calculation to take
20 all those factors into consideration and calculate how
21 much less heart disease there would be?

22 A No.

23 Q How do you know it is not zero?

24 A Because there appears to be statistically a
25 link between smoking and heart disease. And so it

03890

1 seems reasonable to conclude that it wouldn't be zero,
2 that there would be some effect if people smoked
3 less or smoked safer products.

4 Q But you don't know how much?

5 A I don't. I don't think it would eliminate
6 heart disease. As you say, people get heart disease
7 for other reasons. But that it would reduce heart
8 disease, that seems to be a reasonable conclusion.

9 Q You didn't do that analysis?

10 A I am relying largely on Dr. Harris, but also
11 on simply being aware of the fact that smoking and
12 heart disease statistically has been established.

13 Q Have you done any study or calculation to
14 reach that conclusion?

15 A No, I am relying on things I have read. It
16 is not my own work, no.

17 Q Let's go to the last level here, I guess, go
18 down to number five. If I understand if, the first
19 four, if the first four turn out to be true, then the
20 State will have less health care costs, is that
21 correct?

22 A Yes.

23 Q Pardon my writing.

24 The State will have less health care costs if
25 we go through, that there were safer products, more

03891

1 information, different choices, smokers have less
2 disease, and then the State has less health care
3 costs, is that correct?

4 A Yes.

5 Q Now, when you get down to the fifth level,
6 have you done any study or analysis of the health care
7 cost structure of the State of Washington Medicaid
8 program?

9 A I'm not sure what you mean by the health care
10 cost structure of the State of Washington Medicaid
11 program.

12 Q I meant, have you done any study or analysis
13 of the actual structure of the health care costs
14 incurred by the State?

15 A No.

16 Q For example, do you know how much fraud,
17 waste and abuse there is in the Medicaid program that
18 has nothing to do with smoking?

19 A No.

20 Q Do you know what the eligibility requirements
21 are to be a member of the Washington State Medicaid
22 population?

23 A No. Not narrowly, no.

24 Q Have you done any study or analysis of what
25 special health care costs may be experienced by the
03892
1 Washington State Medicaid population because of those
2 eligibility requirements?
3 A No.
4 Q Have you done any calculations to compute the
5 amount of money that you contend would have been saved
6 by the State if these other four conditions had been
7 met?
8 A No.
9 Q No calculation whatsoever?
10 A No. I am relying largely on Dr. Harris to
11 calculate the magnitude of the damages. He will
12 testify to his own analysis. I have read it. It
13 seems reasonable to me. It seems like he knows what
14 he is talking about. But I am relying on his report.
15 You can talk to him about the measurement --
16 Q We will talk to him. But you are the one on
17 the stand now, you understand.
18 A I understand.
19 Q All I am asking, when you reached this
20 conclusion and told the jury there was an economic
21 injury, did you do any calculation?
22 A I didn't myself. No, I didn't.
23 MR. WEBB: That ends my questioning.
24 As a housekeeping matter, I marked an earlier
25 demonstrative exhibit over there in the corner, the
03893
1 structure of CTR, which has been marked as
2 Demonstrative Exhibit 5000. I would like to offer
3 that for demonstrative purposes only.
4 MR. FERGUSON: No objection.
5 THE COURT: Admitted.
6 (Exhibit 5000 was
7 received in evidence.)
8 MR. WEBB: Your Honor, I would like to mark
9 my state injury chart as Demonstrative Exhibit 5001
10 and offer it into evidence.
11 MR. FERGUSON: Can we get it translated?
12 No objection.
13 MR. WEBB: Can't you read that? My writing.
14 I apologize.
15 THE COURT: Admitted.
16 (Exhibit 5001 was
17 received in evidence.)
18 MR. WEBB: Your Honor, I have no more
19 questions of the witness.
20 MR. McCORMICK: Am I still on the mike here?
21 May I proceed, your Honor?
22 THE COURT: Yes.
23 CROSS-EXAMINATION
24 BY MR. McCORMICK:
25 Q For the record, Steve McCormick for American
03894
1 Tobacco, British American Tobacco Company and Brown &
2 Williamson.
3 Dr. Solow, since the British American Tobacco
4 Company is one of the companies that I stand up for in
5 this case, I would like to use the time I have to ask
6 you questions -- to ask you some questions about some
7 British American Tobacco Company documents.
8 Would that be all right?

9 A Okay.
10 Q And specifically, Doctor, the documents I
11 want to ask you about are the ones that you showed to
12 the jury -- or counsel to the State showed to the jury
13 during your testimony last week relating to the
14 pricing of cigarettes in certain Latin American
15 countries, including Costa Rica, Venezuela, Argentina,
16 and two or three others.

17 Do you recall that testimony generally, sir?

18 A Panama and Guatemala I think were the other
19 two, yes.

20 Q Those are documents that were shown to the
21 jury by counsel during your testimony. And that you
22 testified, sir, were evidence to you of price fixing
23 on the sale of cigarettes in those countries, correct?

24 A Yes.

25 Q Now, I want to ask you some questions about

03895

1 the documents and about what was going on down in
2 those countries, Professor. But before I do, that
3 lets me ask you this. You have read, I believe, the
4 complaint in this case, true?

5 A Yes.

6 Q And you understand, although you are not a
7 lawyer, that the complaint is the formal document
8 which is filed by the plaintiff in this case the State
9 of Washington, to get a lawsuit started, right?

10 A Yes.

11 Q It is the document in which the State when it
12 wishes through the due process of law to bring a
13 defendant to the courtroom to stand up and answer
14 allegations, sets out the charges, the complaints made
15 against the defendants in the case?

16 MR. FERGUSON: Objection, your Honor. I
17 believe counsel is instructing the jury on the law.

18 THE COURT: Overruled.

19 BY MR. McCORMICK:

20 Q Do you have my question in mind?

21 A It was a very long statement. No, I'm not
22 sure. I think I was going to agree with it, but now I
23 can't remember the exact statement. If could you
24 repeat it again, please.

25 Q You understood because you read it that what

03896

1 it constitutes is the charges made by the State of
2 Washington against the defendants in this case?

3 A That's my nonattorney's understanding of what
4 it does, yes.

5 Q And you understand --

6 A Among other things. I guess it lays out who
7 the various parties are and maybe asks for what the
8 plaintiff thinks the penalties should be and things
9 like that. What you said is part of it, as I
10 understand it, yes.

11 Q And you understand from reading the complaint
12 that there is no charge, there has been no charge
13 brought by the State of Washington against the
14 defendants in this case that there was any price
15 fixing in the United States or in the State of
16 Washington?

17 Do you understand that?

18 A I understand that. I believe I understand
19 that, yes.

20 Q And do you also understand from having spoken
21 to the plaintiff's counsel in this case and worked
22 with the plaintiff's counsel -- did they tell you, as
23 they told the members of this jury in opening
24 statements, that the State's evidence in this case,
25 its evidence that they would be presenting to the jury
03897

1 in this case, would be that the conspiracy they were
2 alleging would be limited to essentially one area, and
3 that is the area of health claims and health issues,
4 and that otherwise the defendants in this case were in
5 competition with each other.

6 Did they tell you that?

7 A No.

8 Q All right. Let's take a look at it. This is
9 from the transcript of the proceedings of September
10 28th 1998, transcript of the proceedings in this case,
11 the opening statement of the plaintiff. Which counsel
12 for the plaintiff says, I want to make something very
13 clear to you, it said to the members of this jury, it
14 is the State's evidence that the conspiracy you are
15 going to hear about was limited to essentially one
16 area between them, they were joined at the hip in only
17 one area, that area dealing with health claims and
18 health issues, otherwise they were in competition with
19 each other.

20 I don't want you to think that our evidence
21 will be that in all respects they didn't compete,
22 because they did.

23 Do you see that?

24 A I see that.

25 Q Now, let's turn back to the question of these
03898

1 Latin American countries. Before you gave your
2 opinion to the men and women of this jury about what
3 those documents meant and what the excerpts were shown
4 to you from those documents meant, did you, Professor,
5 study the economic markets and conditions in those
6 countries at the time those documents were written?

7 A Any and all economic markets and conditions
8 in those countries?

9 Q Anything about the economic conditions or
10 markets in those countries?

11 A Not as a general matter, no. I haven't done
12 a study of the economy of any one of those countries.
13 I am somewhat familiar with Venezuela, because I have
14 been there a couple of times and given talks there.
15 The economics department at the central bank, to the
16 antitrust authority of Venezuela. But aside from that
17 I have not done detailed studies of those countries.

18 Q Detailed or otherwise, isn't it true, Doctor,
19 that you did no study of the economic markets or
20 economic conditions, including the market for tobacco
21 in those countries during the periods in question?

22 A More or less that is an accurate assessment,
23 yes.

24 Q And you did no study before giving your
25 opinion to the members of this jury that those
03899

1 documents showed price fixing, you did no study of
2 pricing of cigarettes or other products in those Latin
3 American markets, did you, sir?

4 A No.

5 Q In fact, the only thing you did before
6 reaching your opinion, which you conveyed to this jury
7 last Tuesday morning, the only thing you did on this
8 area of Latin America, was to look at the company
9 documents that the plaintiff's lawyers furnished you,
10 true?

11 A Yes. And the documents speak for themselves.

12 Q Well, I think I agree with you on that. I
13 want to take a look at the documents and see exactly
14 what they do say. But let me ask you this. You did
15 at least read the whole document, right?

16 A I tried to, yes. I read through a lot of
17 documents and I have tried to read everything in the
18 documents.

19 Q You didn't just read the excerpts that the
20 plaintiff's counsel displayed to the jury?

21 A No.

22 Q Well, let's turn to some of those. Because
23 if you read all the documents I take it you are
24 comfortable that the excerpts that were shown to the
25 men and women of the jury during your testimony, you

03900

1 are comfortable that that told the whole story to this
2 jury about what was going on between these companies
3 down in --

4 A No. I think there are lots of things
5 potentially going on between those companies. But
6 that certainly tells a part of the story of what is
7 going on between those companies.

8 Q Let's look at some of the rest of the story.
9 Let me start by showing you a document, State's
10 Exhibit WA, for Washington, 6131, which is a document
11 we -- we will establish the date on it in a minute.
12 It is one of the documents involving Latin America
13 that the State offered into evidence in connection
14 with your testimony here. I will see if I can focus
15 this for just a minute.

16 And Professor, do you remember -- this is
17 titled Notes on Decisions/Strategies. It relates to a
18 company called Bigott, B-i-g-o-t-t.

19 Do you see that?

20 A Yes.

21 Q And to something that you testified about
22 called a market share agreement.

23 Do you see that, sir?

24 A Yes.

25 Q And you recall that Bigott is a cigarette

03901

1 company, a subsidiary of my client, the British
2 American Tobacco Company, that sells cigarettes in the
3 country of Venezuela?

4 A I believe that is correct, yes.

5 Q We can take a look at the page Bates number
6 ending 143 -- I'm sorry, 142. And it shows that this
7 is a document from the Venezuela company for the
8 period November/December 1989.

9 Do you see that?

10 A It says from Venezuela for the period
11 November/December 1989.

12 Q So this tells us we are in the country of
13 Venezuela, and it tells us what time period we are
14 talking about?

15 A Yes.

16 Q It also -- the market share agreement, this
17 is one of the things you pointed to and testified to
18 the jury last week as a collusive agreement. This
19 document shows that this market share agreement, that
20 they were talking about was between Bigott, a tobacco
21 company owned by British American Tobacco Company, and
22 a company called Catana, another cigarette company
23 which I believe you testified is affiliated with the
24 Philip Morris Company?

25 A I believe so, that's right.

03902

1 Q All right. Now, let's just take a look at
2 what the rest of this document tells us.

3 Now, Doctor, having read all these documents,
4 are you aware generally of what the situation was back
5 in this 1989 period, and in fact all through the late
6 '80s and into the early 90s with respect to inflation
7 in Venezuela and other Latin American countries?

8 A Not entirely, but to some extent.

9 Q Let's just take a look. Is it going to
10 surprise you that by looking at these documents we
11 find out that during this period of time these
12 countries were going through what economists sometimes
13 refer to as hyperinflation?

14 A I would have to look and see. I haven't
15 studied the monetary policy -- the monetary results in
16 those countries. I am aware that inflation --
17 hyperinflationary episodes occur in those countries
18 sometimes, yes.

19 Q Would you tell the jury what hyperinflation
20 refers to?

21 A Hyperinflation is a very high rate of
22 inflation.

23 Q A rate of inflation beyond anyone's
24 experience who has lived their life in the United
25 States?

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1 A I don't know that the United States has ever
2 been through a period of hyperinflation. So by
3 American standards -- Israel has gone through, Germany
4 in the '30s went through one, Latin American countries
5 go through them from time to time.

6 Q To just give us a benchmark so we can get
7 some comparisons here, Professor, what is the annual
8 rate of inflation like on a December to December basis
9 right now in the United States?

10 A Let me preface this by saying I am not a
11 macroeconomist, so I don't know follow the
12 macroeconomic data particularly. But I will tell you
13 it is on the order of two percent, three percent, say.

14 Q I am going to say two to three percent. Now,
15 let's just take a look and see what was going on here
16 in Venezuela back at the time of this document.

17 Does this show us -- this, again is State's
18 Exhibit 6131 at page 128. This has some information
19 here about pricing. Do you see them, Doctor? Can you
20 read that?

21 A Yes, vaguely. Yeah, a little bit.

22 Q Now, this refers to a price increase, showing
23 the price of a series of brands of cigarettes. Do you
24 know what the monetary unit is in the country of
25 Venezuela?

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1 A Yes.
2 Q The bolivar?
3 A It is also called the bolivar, the B for
4 short.
5 Q The B. It shows that it moved from February
6 of '89 to May of '89, let's call that a four month
7 period, from 18 bolivars, to 23 bolivars, which
8 somebody has written 55 percent increase?
9 A Yes.
10 Q Which sounds like a really big increase?
11 A Yes.
12 Q It goes on to say the price increase was
13 slightly ahead of inflation of forty-five percent
14 since February.
15 Do you see that?
16 A Yeah.
17 Q Now, if Venezuela had forty-five percent
18 inflation in the four months -- February, March, April
19 and May, four months of the year, just to annualize
20 that, and I realize it varies from month to month, but
21 to annualize that, Professor, that would be a rate of
22 inflation of about one hundred and thirty-five percent
23 for a year, true?
24 A I would have to do the calculations. I don't
25 think you can just -- something very high, yes.

03905

1 Q Now, Professor, when a country gets itself in
2 a situation of dealing in this hyperinflationary type
3 of situation, isn't it true that one of the things
4 that happens is the government gets involved in the
5 pricing of products?
6 A That's certainly possible, yes.
7 Q Let's just take a look and see what this
8 document tells us about that, about what was going on
9 with the pricing of products during this
10 hyperinflationary period. And I am referring now to
11 the page that is Bates number 166. And to this
12 section that says pricing excise and import duties.
13 It says here, there is no official price
14 control in Venezuela. Price increases are normally
15 agreed on an industry basis subject to economic
16 justification and sixty days notice to the Venezuelan
17 commission on cost, price and wages.
18 Do you see that, sir?
19 A Yes.
20 Q Until 1989 there have been two price
21 increases, in February and May, which increased the
22 price of a packet of twenty -- that presumably refers
23 to a packet of cigarettes, correct?
24 A Yes.
25 Q -- by 4 and 9 bolivars respectively to 16 and

03906

1 25 bolivars. Do you see that?
2 A Yes.
3 Q Now, Professor, even though you didn't take
4 the time to study what was going on in these
5 economies, it is not unusual in these situations,
6 these situations where foreign countries are dealing
7 in these hyperinflationary situations, where the
8 companies in order to get a price increase are
9 required to come forward, as this document says, on an
10 industry basis to a government agency and apply for
11 the right to raise their prices.

12 Are you aware of that?
13 A I am aware of price controls and situations
14 in which there are price controls the government has
15 to approve price increases, yes.
16 Q That is a situation that is pretty foreign to
17 our culture and our economy, and the way we live and
18 the way the economy works in this country?
19 A As a general matter, we believe that prices
20 should be determined by competition. And in other
21 countries, often there is much more involvement -- not
22 all countries, but in many countries there is more
23 involvement by the government in price controls, yes.
24 Q Let's turn to this market share agreement
25 that we talked about. And you testified last week,

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1 last Tuesday morning, to be exact, that in connection
2 with a Latin American country the market share
3 agreement referred to an agreement whereby two
4 companies have -- I think the example you used was for
5 one, 49.8 percent, somebody else has got some other
6 percent of the market. And they get together and
7 agree to run their businesses so that they don't take
8 each other's market share away from each other?
9 A That's the way a market share agreement would
10 work. If one of them starts to encroach on the other
11 one's market that they would adjust somehow, yes.
12 Q And you told this jury that that was
13 consistent with collusion between these companies,
14 right?

15 A It is certainly consistent with collusion,
16 yes.

17 Q Let's take a look at what this document says
18 about this market share agreement. I will go back to
19 that same page, which is Bates number ending 166,
20 which talks about how this market share agreement came
21 about. Market share agreement. By intensive lobbying
22 in political circles, even the president of Venezuela
23 brought pressure to bear on Bigott, and by refusing to
24 increase products, Catana, the Philip Morris company,
25 right, Catana was able to force people, the British

03908

1 American company, to accept a market share in 1984.
2 Since Bigott only partially complied with this
3 agreement, it was renegotiated in 1986. Bigott
4 complied with the agreement between June of 1986 and
5 1987. But in view of the serious impact on the
6 market, which was being under supplied, we show, my
7 client's company -- we show allowed volume to increase
8 thereafter.

9 In 1988, once again the competition through
10 political pressure, and by withholding its support for
11 price increases forced renegotiation of the agreement.

12 Do you see that language, Doctor?

13 A Yes.

14 Q Now, let me go back. So when this whole
15 thing started, this market share agreement that you
16 testified was collusive, began with the president of
17 Venezuela's coming to my client and saying I want you
18 to enter into a market share agreement with this other
19 country.

20 Do you see that, Doctor?

21 MR. FERGUSON: Objection. The document
22 doesn't say that.

23 THE COURT: Please rephrase.
24 BY MR. McCORMICK:
25 Q Doctor, let me ask you this. This picture
03909
1 that is painted here is something that is completely
2 unheard of in the culture that we live in and the
3 economy that we live in and the market system that we
4 live in in this United States, isn't it, sir?
5 A I'm not sure I would go that far. It is
6 somewhat different. It is certainly more open
7 involvement of the political process in setting up
8 prices, I will grant you that.
9 Q We can't sit here in King County and just say
10 we are going to apply -- move ourselves down to
11 Venezuela mentally without understanding all the
12 ramifications of what was going on there to try to
13 assess these situations, can we, sir?
14 A I think the -- I don't think that economic
15 theory changes when you go to Venezuela. I think that
16 the political institutions do change. I think that is
17 a fair way to put it.
18 Q Let's just say -- use an example and let's
19 just try to take an example out of this document. You
20 understand about a year or so ago that Boeing acquired
21 McDonnell Douglas Corporation?
22 A Yes, I am aware of that.
23 Q Let's go back a few years in time to the
24 point where Boeing and McDonnell Douglas were fighting
25 for share in competitive markets?

03910
1 A I wouldn't characterize it as a competitive
2 market. It was an oligopoly.
3 Q Whatever it was, they were battling it out
4 for orders from the major airlines and everybody knew
5 that somebody wasn't going to stay in business, right?
6 A They were both trying to sell airplanes. I
7 will go that far.
8 Q And if McDonnell Douglas five years ago,
9 let's say, had come to Boeing and said we want to have
10 a market share agreement, you have X percent, let's
11 just run our business so we don't take each other's
12 business, that would be completely unheard of in our
13 environment and completely contrary to the principles
14 under which our economy operates?
15 MR. FERGUSON: Objection, relevance.
16 Possibly calling for a legal conclusion.
17 THE COURT: Overruled.
18 THE WITNESS: What I would say, as a matter
19 of economics, that would not necessarily be
20 implausible, rival companies in an oligopoly often
21 come together and say let's cooperate, let's not
22 compete with each other. That's the nature of
23 collusion. That's what collusion is all about.
24 In all likelihood it would be illegal under
25 the antitrust laws. But I am not going to offer a

03911
1 legal conclusion. I know enough about the antitrust
2 laws to believe if they were to do that, and the word
3 were to get out, and it would get to the justice
4 department that there would be a legal problem.
5 Q They would be prosecuted and sent to jail for
6 doing that?
7 A They could well, yes.

8 Q In our culture?
9 A They could well, yes.
10 Q And it would be inconceivable that if
11 McDonnell Douglas went to Boeing and said, look,
12 before we drive one or the other out of business,
13 let's make a deal, and Boeing said, no, it would be
14 inconceivable for McDonnell Douglas to go to the
15 president of the United States and say, I want you to
16 go to Boeing and see if you can't persuade them to
17 enter into a market share agreement.
18 You cannot imagine that in this country?
19 A I think that is very unlikely, yes.
20 Q Let's turn to another document --
21 THE COURT: Before you do that, it is 4:00.
22 We will take a break. We will see you at 9:00.
23 (Jury not present.)
24 THE COURT: Please sit down.
25 MR. McCORMICK: Two things, your Honor.

03912

1 First of all, with respect to Professor Donaldson,
2 both the issues I have relate to Professor Donaldson.
3 First of all, with relation to Professor
4 Donaldson's testimony, at the break we were given a
5 proposal, And I don't know if this was passed up to
6 the Court. Okay. We were given a proposal that
7 provides for an allocation of time for Professor
8 Donaldson's testimony on Tuesday, which I think is
9 tomorrow, Wednesday and Thursday. Okay.
10 So as an initial proposition the speech which
11 couldn't be moved has evidently been moved. I gather
12 from this that Professor Donaldson would be available
13 on Thursday.
14 MR. LUVERA: We are trying to make a
15 proposal, your Honor. I don't think the
16 cross-examination from Mr. McCormick is appropriate.
17 We are trying to explore cooperative ways.
18 MR. McCORMICK: I don't mean to
19 cross-examine, your Honor. I am in sort of that mode.
20 In any event, the bottom line it seems evident from
21 this, that it would be possible, at least under some
22 circumstances, for Professor Donaldson to be
23 available. The proposal is for the plaintiffs to have
24 eight hours of direct and redirect examination, for
25 the defense to have five and a half hours. I can go

03913

1 into the details why, I think, it is obvious on its
2 face, this is not acceptable to us. Let me explain
3 it. You are looking at me like you want me to explain
4 it.
5 THE COURT: I am just here listening.
6 MR. McCORMICK: I will try not to belabor
7 this. Your Honor, this is not agreeable to us. The
8 fact of the matter is, as Professor Donaldson is going
9 to proceed we are confident, as everyone has proceeded
10 in this case, you can take four minutes or five
11 minutes on direct examination to throw something
12 against the wall, we refer to them at the defense
13 counsel table as drive-by shootings, free-based
14 nicotine, it takes three minutes to throw that against
15 the wall and it may take a half hour to forty-five
16 minutes to scrape it off. Tobacco companies lie,
17 executive lies about addictions takes fifty-six
18 seconds, the explanation of how that debate started

19 all the way back in 1964, what happened at that
20 hearing, that sound bite, what happened after that
21 sound bite doesn't take fifty-six seconds, it may take
22 a half hour, forty-five minutes. And the idea that we
23 would be bound by Court rule to parity, much less --
24 less than parity really doesn't make sense in the way
25 this case is being tried. And we would object to the

03914

1 allocation that they proposed.

2 More importantly, your Honor, we don't
3 understand why there needs to be an allocation at this
4 point. As I say, it appears from this that it is at
5 least possible for Professor Donaldson to be here on
6 Thursday.

7 MR. LUVERA: Your Honor, the situation is, as
8 described by Mr. Berman, and that is that the witness
9 will literally lose his position at the university if
10 he is not there by Monday. Since your Honor has
11 indicated that you do not wish interruptions, we are
12 trying to find a compromise to the solution. I
13 understood your Honor to suggest it might be worth
14 exploring an allocation of time as a solution. And
15 that if we could arrange to have the speech put off
16 that Thursday might be available, and that would be a
17 logical way to proceed.

18 Before any commitment to is made to put off
19 the speech, which I think can be made at some great
20 sacrifice, I offered a proposal on allocation of time.
21 Now, that's the status.

22 This is the first response I have heard since
23 I gave it to them at the recess. I think I am hearing
24 counsel say that it is his belief that what should
25 occur procedurally is that the direct examination

03915

1 should be considerably shorter than the
2 cross-examination, a statement which I find quite
3 surprising. The plaintiff having the burden of proof
4 generally produces evidence. And traditionally the
5 cross-examination has been considerably shorter, in my
6 experience in trying cases, the cross-examination has
7 been considerably shorter than the direct examination
8 for that very reason.

9 For example, the qualifications of the
10 witness will take some time, the establishment of the
11 field that he works in will take some time. To do
12 this will require, as I'm sure you might imagine, some
13 cutting back of a number of documents we intended to
14 review with him to see what his opinions were within
15 the field he is talking about.

16 I for one do not believe that the allocation
17 is unreasonable if we are going to have an allocation
18 of time. And frankly we thought about it at our
19 table. We don't know of any other solution, given the
20 witness's situation and our inability to designate
21 somebody else, unless we simply recess the trial early
22 this week without calling anybody and trying to
23 reschedule him at a later time, which doesn't make a
24 lot of sense to us.

25 So I guess in summary we are trying offer and

03916

1 compromise. We think it is a reasonable compromise.
2 And we are very willing to hear your Honor's views on
3 it.

4 THE COURT: The question in my mind, if he
5 would at least potentially be available on Thursday,
6 is also whether he would also potentially be available
7 on Friday for a limited session.

8 MR. LUVERA: Yes, he would be, your Honor.
9 I did not use Friday because I didn't know if
10 that was available, given your remarks.

11 THE COURT: I expect Judge Armstrong to be
12 here Friday morning. But, reluctantly, I could be in
13 session Friday afternoon, although I would have to ask
14 the jurors, and you collectively, about availability.

15 Let me hear more from the defendants on that
16 issue, if you have anything to say.

17 MR. McCORMICK: Well, we don't have a problem
18 with going on Friday if it is necessary to get
19 Professor Donaldson finished this week.

20 THE COURT: I don't know whose notes these
21 are.

22 MR. LUVERA: Those are mine.

23 THE COURT: One thing about the time. It
24 actually works out evenly, but the time allocation
25 doesn't include the recess, morning and afternoon.

03917

1 MR. LUVERA: No, sir.

2 THE COURT: So on both ends of the time
3 allocation there would be a bit less. I think it
4 totals in the proposal 7.25 for plaintiff and 5 for
5 defendant. It doesn't change the principle here. I
6 would like to see when this witness, that is Dr.
7 Solow's testimony actually concludes, and exactly how
8 many hours we have. And then I am prepared to hear
9 more briefly, if anyone wants to say anything.

10 It looks to me as if there is enough time,
11 particularly if we have the safety valve on Friday, to
12 have an even-handed allocation of the time available.
13 And I'm not going to make a ruling on what that would
14 be, but it appears to me that there would be an
15 adequate opportunity for direct and cross, maybe
16 constrained.

17 But let's see what the totals are and hear
18 anything else you want me to hear very briefly, and
19 then I will give you a ruling. Do the defendants have
20 any better sense at this point -- I am not going to
21 hold it to you precisely -- about how much more cross
22 we have collectively.

23 MR. McCORMICK: I had really hoped to finish
24 today. And I would hope to take no more than a half
25 hour in the morning. There are a couple of other

03918

1 crosses. I think collectively our goal would be to
2 finish by the mid morning break.

3 MR. SCHIFFERMAN: It wouldn't be that fast.

4 MR. McCORMICK: By noontime anyway, your
5 Honor.

6 THE COURT: Okay. Unless there is anything
7 else anyone wants to say on that subject or another we
8 will let you go --

9 MR. McCORMICK: Your Honor, there is one
10 other issue I would like to raise. And it is an
11 evidentiary issue relating to Professor Donaldson's
12 testimony. I know your Honor has under consideration
13 the documents that were submitted by the plaintiff for
14 Professor Donaldson and our objections. I would

15 appreciate if I could have five minutes to be heard in
16 aid of our objections on that.

17 THE COURT: What I have got is an emergency
18 meeting, an executive meeting five minutes from now.

19 MR. McCORMICK: Could we do this, could we
20 have some time when the jury is not waiting for us, or
21 at the Court's convenience some time before Dr.
22 Donaldson goes on? We would -- we would like an
23 opportunity to be heard in aid of that objection.

24 MR. LUVERA: Your Honor, we haven't done that
25 up until now. And I would prefer your Honor's rulings

03919

1 in advance. And then if counsel wants to indicate
2 which of those he would like to talk about, I would
3 feel a lot more comfortable than having him stand up
4 and talk about documents. I don't know what he is
5 going to talk about. We are going to have to respond.
6 The witness is going to have to wait. There will be
7 time involved. I would very much urge that the Court
8 make its rulings, and then if counsel wants to be
9 heard on them your Honor can hear them.

10 THE COURT: Do you have a couple of specific
11 documents in mind? We are not going to do it right
12 now.

13 MR. McCORMICK: I have one document in mind,
14 your Honor.

15 THE COURT: Will you tell the plaintiffs what
16 that document is? I take it literally you are talking
17 about a few minutes on it. Plaintiffs will have a
18 chance to look at that document and prepare to argue
19 it in the morning, we will do that.

20 MR. LUVERA: I never got the number.

21 THE COURT: You will get it. I have asked
22 the defendants to give you that number so you will be
23 prepared to argue it in the morning.

24 (Evening recess.)

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2 STATE OF WASHINGTON)
3 COUNTY OF KING)
4 _____)
5
6

7 We, James D. Lavielle, RPR, CSR, Barry Fanning,
8 RPR, Official Court Reporters for the Superior Court,
9 State of Washington, hereby certify that the foregoing
10 comprises a full, true and correct transcription of my
11 stenographic notes taken in the above-entitled cause.
12
13

14 Dated this 26th day of October, 1998.

15
16 OFFICIAL COURT REPORTER

17
18
19 _____
James D. Lavielle, RPR, CSR

20
21 _____
Barry Fanning, RPR, CSR

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